1994

Carlisle v. Consolidated Rail Corp. and Justice Ginsburg's Dissent: Striking an Equitable Compromise between the Interests of Labor and Management Regarding FELA Liability for Work-Related Stress

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Justice Ruth Bader Ginsburg recently authored a compelling dissent in Consolidated Rail Corp. v. Gottshall (Gottshall II),1 arguing that the Federal Employers Liability Act (FELA) should be extended to permit actions for negligent infliction of emotional distress arising from work-related stress.2 Largely relying on the reasoning of the United States Court of Appeals for 1. 114 S. Ct. 2396 (1994).
2. See Gottshall II, 114 S. Ct. at 2419 (concluding that Third Circuit in Carlisle v. Consolidated Rail Corp., 990 F.2d 90 (3d Cir. 1993), rev'd sub nom. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994), correctly determined that plaintiff's stress related injuries were compensable under FELA). In Gottshall II, the United States Supreme Court overturned the Third Circuit's holding in Carlisle that permitted recovery under FELA for genuine and foreseeable emotional injuries. For a discussion of Carlisle's factual background, see infra notes 121-35 and accompanying text. The majority opinion, written by Justice Thomas, rejected the genuineness/foreseeability threshold established by the Carlisle court for emotional injury claims brought under FELA. Gottshall II, 114 S. Ct. at 2408. For a discussion of the Carlisle court's genuineness/foreseeability threshold, see infra note 169 and accompanying text. The Court, instead, adopted the "zone of danger" threshold for emotional injury claims brought under FELA, a traditional common law test used to limit recovery on claims of negligent infliction of emotional distress. Gottshall II, 114 S. Ct. at 2410. For a discussion of the traditional common law tests used to limit recovery for negligent infliction of emotional distress, including the zone of danger test, see infra notes 140-45 and accompanying text. The Gottshall II Court found Carlisle's foreseeability/genuineness threshold to be "fatally flawed in a number of respects." Gottshall II, 114 S. Ct. at 2410. First, the Court disagreed with the Third Circuit's refusal to apply the traditional common law limits for negligent infliction of emotional distress in the FELA context. Id. at 2409. The Gottshall II Court concluded that such common law limits on negligent infliction of emotional distress "play a vital role" in defining the scope of a railroad's duty under FELA to protect its workers from emotional injuries. Id. Second, the Gottshall II Court questioned the viability of the Carlisle court's foreseeability/genuineness threshold for FELA claims because such an approach was "bound to lead to haphazard results" and the "possibility of infinite [FELA] liability." Id. Asserting that "every injury has ramifying consequences . . . without end," the Court maintained that a foreseeability standard would fail to properly limit the scope of potential FELA liability. Id. For a discussion of why the possibility of "infinite liability" does not arise in the FELA context, see infra notes 183-90 and accompanying text. Finally, the majority in Gottshall II rejected as "unprecedented" the Carlisle court's decision to permit recovery under FELA for work-related stress. Gottshall II, 114 S. Ct. at 2409. Finding no support in the common law for the Carlisle holding, the Gottshall Court concluded that such a decision would "dramatically expand employers' FELA liability" and make railroads the insurers of their employees' mental health. Id. (197)
the Third Circuit in the companion case to *Gottshall II, Carlisle v. Consolidated Rail Corp.*, Justice Ginsburg rejected the majority’s attempt to limit the scope of compensable emotional injuries under FELA. In particular, she objected to the Court’s exclusive use of the “zone of danger” test in determining whether negligent infliction of emotional distress is cognizable under FELA. Finding that the Court’s restrictive common law test “leaves [some] severely harmed workers remediless,” Justice Ginsburg maintained that the threshold test, instead, should be based upon the “genuineness and gravity of the [railroad] worker’s [emotional] injury.” This threshold test was first outlined by the Third Circuit in *Carlisle*.

In view of Justice Ginsburg’s reliance upon the Third Circuit’s reasoning in *Carlisle*, a detailed examination of the *Carlisle* court’s opinion will provide additional insight into the bases for her dissent in *Consolidated Rail Corp. v. Gottshall*. Specifically, Justice Ginsburg reaffirmed three main positions taken by the Third Circuit in *Carlisle*: 1) the zone of danger test is not the “appropriate” test to be applied to FELA claims for negligent in-

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4. *Gottshall II*, 114 S. Ct. at 2418-19 (Ginsburg, J., dissenting). The majority restricted the scope of compensable emotional injuries under FELA by selecting one of the common law tests that state courts have applied to limit recovery by the public for negligently inflicted emotional distress. See id. at 2408-09 (maintaining that common law tests regarding scope of recovery for negligent infliction of emotional distress play “vital role” in defining extent of railroad’s duty under FELA to avoid inflicting emotional injury). For a discussion of the various common law tests applied by state courts to limit recovery for emotional distress claims, see infra notes 140-45 and accompanying text. The Court then adopted the “zone of danger” test for limiting recovery under FELA for negligently inflicted emotional distress. *Gottshall II*, 114 S. Ct. at 2410-11.

5. *Gottshall II*, 114 S. Ct. at 2419 (Ginsburg, J., dissenting). Justice Ginsburg cited the “fear of ‘infinite liability’ to an ‘infinite number of persons’ ” as the majority’s principal reason for adopting the zone of danger requirement for FELA claims of emotional distress. Id. at 2418 (Ginsburg, J., dissenting) (quoting Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2409 (1994)). Noting that the broad language of FELA demands broad coverage, Justice Ginsburg observed that the majority’s concern of infinite liability should not control in the FELA context because “the class of potential plaintiffs under the FELA is not the public at large.” Id. at 2412 (Ginsburg, J., dissenting). She maintained that FELA “covers only railroad workers who sustain injury on the job.” Id. (Ginsburg, J., dissenting).

6. Id. at 2419 (Ginsburg, J., dissenting). Justice Ginsburg found the zone of danger test too restrictive because Congress, in legislating FELA, gave the courts wide discretion to “fashion remedies constantly ‘liberal,’ and appropriately ‘enlarged to meet changing conditions’ ” in the railroad industry. Id. at 2418 (Ginsburg, J., dissenting) (quoting Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958)).

7. See *Gottshall II*, 114 S. Ct. at 2409 (declaring as unprecedented *Carlisle* holding that railroad employers have duty to avoid creating stressful work environment); see also *Carlisle*, 990 F.2d at 97-98 (upholding for first time claim under FELA for negligently inflicted emotional distress arising from work-related stress).

fliction of emotional distress;9 2) railroad employees with "genuine" and
"grave[er]" emotional injuries must not be left "remediless;"10 and 3) FELA
is a broad remedial statute that must be "enlarged to meet changing con-
ditions . . . [within] the [railroad] industry."11 This Note provides an in-
depth analysis of the foregoing three points from the perspective of the
Third Circuit's decision in Carlisle.12 First, this Note asserts that a majority
of states have advanced beyond the restrictive "zone of danger" require-
ment and have permitted more liberal recovery on claims for negligent
infliction of emotional distress.13 Second, this Note expands on Justice
Ginsburg's view that FELA must "fashion" remedies that are responsive to
the changing conditions of the railroad industry;14 this Note asserts that
the emotional dangers of overworking railroad employees are becoming
more problematic than the physical dangers inherent in railroad opera-
tions.15 Finally, similar to Justice Ginsburg's dissent, this Note concurs
with the Third Circuit's decision in Carlisle and maintains that the Carlisle
decision offers an equitable remedy for emotional injury claims because it
respect the interests of both railroad labor and management.16

I. INTRODUCTION

Congress established the Federal Employers Liability Act17 in 1908 to
provide a federal remedy for railroad employees injured as a result of their

10. Id. (Ginsburg, J., dissenting).
11. Id. (Ginsburg, J., dissenting) (quoting Kernan v. American Dredging Co.,
355 U.S. 426, 432 (1958)).
12. See Carlisle v. Consolidated Rail Corp., 990 F.2d 90, 97 (3d Cir. 1993)
(holding that plaintiff may recover under FELA for "negligent infliction of emo-
tional distress arising from work-related stress"), rev'd sub nom. Consolidated Rail
and its underlying reasoning, see infra notes 136-73 and accompanying text.
13. See Gottshall II, 114 S. Ct. at 2418 (Ginsburg, J., dissenting) (observing that
zone of danger test is inconsistent with common law tests applied by some state
courts). For a discussion of the common law tests applied in a majority of states,
see infra notes 140-45 and accompanying text.
from Congress is to fashion remedies constantly 'liberal,' and appropriately 'en-
larged to meet changing conditions and changing concepts of industry's duty to-
ward its workers.' " (quoting Kernan v. American Dredging Co., 355 U.S. 426, 432
(1958))).
15. For a discussion of the growing risks of stressful working conditions within
the railroad industry, see infra notes 211-15 and accompanying text.
16. For a discussion of why the Carlisle holding offers an equitable remedy
that respects the interests of both labor and management, see infra notes 174-97
and accompanying text.
17. 45 U.S.C. § 51 (Supp. IV 1992). The United States Supreme Court originally
struck down the FELA legislation in Howard v. Illinois Cent. R.R., 207 U.S.
463 (1908), on the ground that FELA interfered with intrastate commerce. Howard,
207 U.S. at 501-03. Congress subsequently enacted another version of FELA in
1908, which applied exclusively to interstate commerce. See Pub. L. No. 60-100, 35
employer's negligence. In 1907 alone, over 11,000 railroad employees were killed on the job, while an additional 88,000 suffered injuries. Confronted with such alarming statistics, Congress enacted FELA primarily to encourage drastic improvements in employee safety and to provide adequate compensation for families of injured employees. As a result, FELA was a practical response by Congress to the realities of the railroad industry in the early 1900s.

FELA enables railroad employees to recover in tort for any injuries suffered as a result of railroad negligence. Recognizing FELA's remedial


20. Id.; see Gary Taylor, Truth, Justice, and FELA: Two Sides, NAT'L J., Apr. 30, 1990, at 27 (reporting that in 1907, 88,000 railroad workers were injured and 4,500 were killed). At the turn of the century, the railroad industry was responsible for one of the highest rates of employee accidents in United States history. Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991). The average remaining life expectancy of a switchman was barely seven years; a brakeman had an 80% chance of dying from injuries sustained on the job. Taylor, supra, at 27.


22. See Phillips, supra note 21, at 50 (noting that in response to appalling number of injuries and deaths suffered by railroad workers, Congress passed FELA to provide reasonably reliable tort compensation system). Prior to FELA, railroad workers had little power to bring about changes in their employment conditions because labor unions were virtually nonexistent and railroad labor was cheap and in abundant supply. Schwartz & Mahshigian, supra note 19, at 3. In contrast, the railroad industry was extremely powerful. See Taylor, supra note 20, at 27 (describing railroads as dominant American industry during early twentieth century). In addition to being the dominant employer in the United States, railroads were vitally important to the economic growth of the country. See id. at 27 (noting that railroads were not only dominant in American industry but were important in expansion of American frontier).

23. See Urie v. Thompson, 337 U.S. 163, 181-82 (1949) (finding that wording of FELA is not restrictive as to particular type of injury suffered); see also Buell, 480 U.S. at 565 (recognizing that FELA provides employees substantial protection
and humanitarian purpose, the United States Supreme Court has consistently interpreted the term "injury" in FELA as "all-inclusive."24 However, as employees began to sue railroads for negligent infliction of emotional distress, it became unclear whether FELA provided a remedy for emotional injuries.25 A great debate emerged among the lower courts as to whether emotional injuries were compensable under FELA.26 As a result, the United States Supreme Court granted certiorari in Atchison, Topeka & Santa Fe Railway v. Buell27 to consider the issue.28 The Buell Court de-

24. Urie, 337 U.S. at 180-81; see Buell, 480 U.S. at 561-62 (recognizing that FELA is a remedial statute that has been construed very broadly); Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957) (finding that FELA cases should go to jury if evidence justifies conclusion that "employer [sic] negligence played any part, even the slightest," in producing employee's injury); Jamison v. Encarnacion, 281 U.S. 835, 840-41 (1930) (noting that in spirit of broad construction, courts have construed FELA to cover some intentional torts even though FELA is a negligence statute).

25. Holliday v. Consolidated Rail Corp., 914 F.2d 421, 423 (3d Cir. 1990) (observing that after Buell "it is not clear that the FELA was intended to provide for a recovery" in emotional distress cases), cert. denied, 498 U.S. 1090 (1991); Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990) ("The application of FELA's negligence standard to claims for purely emotional injury remains an unsettled matter."); see Puthe v. Exxon Shipping Co., 2 F.3d 480, 482 (2d Cir. 1993) (stating that FELA does not distinguish between claims alleging physical or emotional injury); Moody v. Maine Cent. R.R., 823 F.2d 693, 694 (1st Cir. 1987) (noting that Buell decision left door to recovery for emotional injuries "somewhat ajar" but not "wide open").

26. See, e.g., Puthe, 2 F.3d at 483 (declining to decide standard for type of injury or misconduct required to establish claim for negligent infliction of emotional distress under FELA); Gottshall, 988 F.2d at 358 (holding that negligent infliction of emotional distress is cognizable under FELA in certain circumstances); Plaisance v. Texaco, Inc., 966 F.2d 166, 167 (5th Cir. 1992) (hereinafter Plaisance III) (modifying previous holding that purely emotional injuries were compensable under FELA and leaving question to more appropriate fact pattern in future), cert. denied, 113 S. Ct. 604 (1992); Ray v. Consolidated Rail Corp., 998 F.2d 704, 705 (7th Cir. 1991) (holding that "physical contact or threat of physical contact" is required to recover under FELA for negligent infliction of emotional distress), cert. denied, 112 S. Ct. 914 (1992); Elliot v. Norfolk & W. Ry., 910 F.2d 1224, 1229 (4th Cir. 1990) (refusing to decide whether FELA permits recovery for purely emotional injuries without additional physical symptoms); Adams, 899 F.2d at 539 (declining to decide whether FELA provides cause of action for purely emotional injuries); Moody, 823 F.2d at 694 (refusing to address issue of whether emotional injuries are compensable under FELA); Buell v. Atchison, Topeka & Santa Fe Ry., 771 F.2d 1320, 1324 (9th Cir. 1985) (holding that purely emotional injuries are cognizable under FELA), aff'd on other grounds, 480 U.S. 557 (1987). 27. 480 U.S. 557, 561 (1987).

28. Id. at 568 (noting that issue of whether emotional injuries are cognizable under FELA is not purely question of statutory construction).
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clined to establish a bright line test for analyzing emotional injury claims brought under FELA. Instead, the Supreme Court invited the circuit courts to explore the possibility of recovery for emotional injuries under FELA in light of common law developments in tort jurisprudence.

The United States Court of Appeals for the Third Circuit addressed the issue of whether emotional injuries are compensable under FELA in Carlisle v. Consolidated Rail Corp. In Carlisle, a railroad employee brought an action against Conrail in the United States District Court for the Eastern District of Pennsylvania for negligent infliction of emotional distress. The employee alleged that he had been subjected to dangerous and stressful work conditions over a period of four years. Following a jury trial, the employee was awarded damages of $386,500. Conrail subsequently moved for a judgment notwithstanding the verdict, arguing that the employee's emotional injuries were not cognizable under FELA. The district court denied the motion and Conrail appealed. Affirming the district court's decision, the Third Circuit held that emotional injuries are compensable under FELA when caused by extended exposure to dangerous and stressful working conditions.

This Note will examine the development of recovery for emotional injuries under FELA. As background, Section II of this Note analyzes the differing views taken by the Supreme Court and several circuit courts con-

29. Id. at 570.
30. Id. at 568; see Plaisance I, 937 F.2d at 1006 (noting that Buell is recognized as open invitation for lower courts to explore possibilities of recovery for purely emotional injuries under FELA).
32. Carlisle, 990 F.2d at 91-92. For a discussion of the procedural history of Carlisle, see infra notes 190-35 and accompanying text.
33. Carlisle, 990 F.2d at 92.
34. Id.
35. Id. at 92-93.
36. Id. at 92.
37. Id. at 98. The Third Circuit crafted its holding in these terms in order to emphasize the importance of foreseeability. Id. at 97 (focusing on railroad's ample notice of stressful working conditions that established pattern of extended exposure to dangerous work-related stress). In addition to reiterating the requirement that an employee's emotional injuries must be the "reasonably foreseeable" result of railroad negligence, the Carlisle court also required proof of "extended exposure" to dangerous work-related stress. Id. at 96-97. As such, proof of "extended exposure" to dangerously stressful working conditions increases the likelihood that the resulting emotional injuries are "reasonably foreseeable." Id. at 97-98 (concluding that employee's injuries were foreseeable because Conrail had ample opportunity to discover hazardous working conditions).
cerning the issue of whether emotional injuries are compensable under FELA, specifically focusing on the meaning of the statutory term "injury." 38 Section III of this Note then presents an analysis of the Third Circuit's decision in Carlisle v. Consolidated Rail Corp. 39 Recognizing the conflicting interests of labor and management with regard to FELA, this Note asserts in Section IV that the Third Circuit's holding strikes an equitable balance between an employee's right to seek recovery for genuine emotional injuries and an employer's concern over excessive and frivolous litigation.40 Section IV also acknowledges the wisdom of the Carlisle court's holding, but suggests that more persuasive grounds exist upon which to support such a holding.41 Finally, Section V of this Note examines the impact the Carlisle decision will have on future FELA litigants and concludes that the interests of both labor and management will be better protected as a result of Carlisle.42

II. BACKGROUND

FELA imposes a duty upon railroads to provide their employees with a safe work environment.43 Specifically, section 51 of FELA permits recovery by employees who suffer injuries as a result of railroad negligence.44

38. See 45 U.S.C. § 51 (Supp. IV 1992) (allowing recovery in damages for any "injury" suffered by railroad employees as a result of employer negligence). For a discussion of the relevant Supreme Court and circuit court decisions regarding FELA, see infra notes 49-65 and accompanying text.

39. This Note addresses the reasoning behind the Carlisle court's decision to allow recovery for emotional injuries resulting from extended exposure to dangerous and stressful working conditions. For a discussion of the Carlisle court's holding and its underlying rationale, see infra notes 136-73 and accompanying text.

40. For a discussion of how the Carlisle decision constitutes an equitable balance between the conflicting interests of labor and management with regard to FELA, see infra notes 174-97 and accompanying text.

41. For an analysis of alternative grounds upon which the Carlisle holding may be based, see infra notes 198-235 and accompanying text.

42. For a discussion of Carlisle's impact on FELA jurisprudence, see infra notes 236-46 and accompanying text.


44. 45 U.S.C. § 51 (Supp. IV 1992). Section 51 of FELA provides in pertinent part:

Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such [railroad] ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [railroad].

Id. (emphasis added). In 1910, Congress amended FELA to allow concurrent state and federal jurisdiction over FELA cases. Schwartz & Mahshigian, supra note 19, at 4. The amendment also extended the venue provisions of FELA to permit a plain-
The United States Supreme Court has established that the term "injury" in section 51 applies to any physical injury a railroad employee sustains as a result of a railroad's negligence. The question remains, however, as to whether the term "injury" encompasses purely emotional injuries. A conflict has developed as federal courts have attempted to reconcile the broad remedial purpose of FELA with the common law standards imposed by the courts.

A. Supreme Court Shapes Scope of FELA

The Supreme Court has recognized that Congress intended FELA to be a broad remedial statute that should be liberally construed by federal courts to bring a cause of action in any jurisdiction where: 1) defendant conducts business, 2) defendant resides or 3) injury took place. For a discussion of other amendments to FELA, see supra note 21.


46. Holliday v. Consolidated Rail Corp., 914 F.2d 421, 423 (3d Cir. 1990) (noting that Buell "did not resolve the question of whether the term 'injury' within the FELA included emotional injuries"), cert. denied, 498 U.S. 1090 (1991); Stoklosa v. Consolidated Rail Corp., 864 F.2d 425, 426 (6th Cir. 1988) ("The question of whether a cause of action for purely emotional injury exists under FELA is not settled."). For other examples of cases in which circuit courts have considered the possibility of recovery under FELA for purely emotional injuries, see supra note 26.

47. See Urie, 337 U.S. at 181-82 (concluding that language of FELA should be broadly construed). FELA's broad remedial purpose was made clear by the Supreme Court in Urie. Id. For a discussion of Urie, see infra notes 51-54 and accompanying text. The Buell Court, however, was hesitant to liberally construe FELA with regard to purely emotional injuries. See Buell, 480 U.S. at 570 (concluding that "broad pronouncements" regarding compensability of emotional injuries may have to give way to precise application of developing legal principles).

courts. Consequently, the Supreme Court has consistently held that the
term "injury" in FELA was intended by Congress to be an all-inclusive
term. In Urie v. Thompson, the Court held that a railroad fireman who
contracted silicosis as a result of work-related activities had suffered an
"injury" within the scope of FELA. Recognizing that the language of
FELA was "as broad as could be framed," the Court construed the plain
language of FELA as making compensable "every injury suffered by any
employee while employed by reason of the carrier's negligence."

In addition to acknowledging FELA's broad remedial purpose, the
Supreme Court has also recognized the dynamic nature of FELA. For ex-
ample, in Kernan v. American Dredging Co., the Court discussed whether

49. Buell, 480 U.S. at 561-62; see Rogers, 352 U.S. at 506 (finding that FELA
cases should go to jury if evidence justifies conclusion that "employer [sic] negli-
gence played any part, even the slightest," in producing employee's injury); Jamison,
281 U.S. at 640-41 (noting that in spirit of broad construction, courts have
construed FELA to cover some intentional torts even though FELA is a negligence
statute).

50. Buell, 480 U.S. at 561-62 (citing Urie v. Thompson, 337 U.S. 163, 180
(1949)). For a general review of Supreme Court precedent with regard to FELA's
liberal construction, see supra note 45.

51. 337 U.S. 163 (1949).

52. Id. at 166-67. Silicosis is a pulmonary disease that is medically defined as
"a form of pneumoconiosis resulting from occupational exposure to an inhalation
of silica dust over a period of years." Stedman's Medical Dictionary 1422 (25th ed.
1990). Silicosis is "characterized by a slowly progressive fibrosis of the lungs,
which may result in impairment of [the] lung[s]." Id.

53. Urie, 337 U.S. at 180-81. As a fireman, the plaintiff worked on steam loco-
motives for over thirty years. Id. at 165. The jury found that the silicosis was
caused by the plaintiff's continuous inhalation of silica dust blown from the train's
steam engine. Id. at 166. At issue before the Supreme Court in Urie was whether
FELA should be limited to accidental injuries or extended to injuries in the nature
of occupational disease, such as silicosis. Id. at 180-81. In extending FELA's cover-
age to occupational disease, the Urie Court observed that to "read into this all-
inclusive wording a restriction as to ... the particular sorts of harms inflicted,
would be contradictory to the wording [as well as] the remedial and humanitarian
purpose of FELA." Id. at 181-82.

54. Id. at 181 (emphasis added). The Urie Court observed that a liberal con-
struction of FELA was consistent with Supreme Court precedent. Id. at 182 n.20
(citing Jamison v. Encarnacion, 281 U.S. 635, 640 (1930)).

55. 355 U.S. 426 (1958). In Kernan, a seaman died when an open-flame kero-
sene lamp on the ship's deck ignited highly inflammable vapors of petroleum
and engulfed him in flames. Id. at 427. The United States District Court for the
Eastern District of Pennsylvania found that the seaman's death was caused by the
employer's failure to comply with a United States Coast Guard navigational regula-
tion. Id. at 427-28. Nevertheless, the district court concluded that the regulation
was not intended to protect seamen from petroleum explosions and, therefore,
was inappropriate as a standard of care in the FELA case. Id. at 428-29. Following
an appeal by the plaintiff, the Third Circuit affirmed the district court's decision in
favor of the defendant tugboat owner. Id. at 427.

Recognizing that the plaintiff brought his claim under the Jones Act, 46
U.S.C. § 688 (1952), the Supreme Court examined the protections afforded
seamen under the Act. Kernan, 355 U.S. at 429. The Kernan Court interpreted the
Jones Act as creating a federal right of action similar to FELA. Id. Acknowledging
common law tort principles restricted the remedies afforded by FELA.\textsuperscript{56} Rejecting such limitations, the \textit{Kernan} Court concluded that Congress did not intend to create a "\textit{static} remedy, but one which would be \textit{developed} and \textit{enlarged} to meet changing conditions and changing concepts of industry's duty toward its workers."\textsuperscript{57}

that the Jones Act provides protection against employer negligence, the Court further noted that the Jones Act incorporates all provisions of FELA. \textit{See id.} at 430-31 (noting that Jones Act provides same cause of action as that provided by FELA); \textit{see also} \textit{Puthe} v. Exxon Shipping Co., 2 F.3d 480, 482 (2d Cir. 1993) (stating that Jones Act incorporated by reference all provisions of FELA). Because the Jones Act implicates the provisions of FELA, the \textit{Kernan} Court concluded that FELA jurisprudence was applicable to Jones Act cases. \textit{Kernan}, 355 U.S. at 429 n.3; \textit{see Puthe}, 2 F.3d at 482 (recognizing that Jones Act claim is guided by law developed under FELA and Jones Act); \textit{Plaisance} v. Texaco, Inc., 937 F.2d 1004, 1006 (5th Cir. 1991) (applying Supreme Court precedent in \textit{Atchison, Topeka & Santa Fe Ry. v. Buell}, 480 U.S. 557 (1987), to Jones Act case), \textit{cert. denied}, 113 S. Ct. 604 (1992). Since the \textit{Kernan} decision, federal courts have viewed decisions in Jones Act cases as setting precedent with respect to FELA. \textit{See, e.g.}, \textit{Gottshall} v. Consolidated Rail Corp., 988 F.2d 355, 364 (3d Cir. 1993) (considering Jones Act case as part of evolving FELA jurisprudence), \textit{rev'd}, 114 S. Ct. 2396 (1994); \textit{Visconti} v. Consolidated Rail Corp., 801 F. Supp. 1200, 1209-10 (S.D.N.Y. 1992) (same); \textit{Smolsky} v. Consolidated Rail Corp., 780 F. Supp. 283, 287 (E.D. Pa. 1991) (same). As a result, federal courts have applied Jones Act rulings such as \textit{Kernan} in developing FELA jurisprudence. \textit{See, e.g.}, \textit{Carlisle} v. Consolidated Rail Corp., 990 F.2d 90, 92 (3d Cir. 1993) (applying precedent of \textit{Kernan} to FELA case) \textit{rev'd sub nom.}, Consolidated Rail Corp. v. \textit{Gottshall}, 114 S. Ct. 2396 (1994); \textit{Gottshall}, 988 F.2d at 368 (same).

\textsuperscript{56} \textit{Kernan}, 355 U.S. at 432. The Supreme Court was confronted with the issue of whether, contrary to common law tort doctrines, proof of the violation imposed FELA liability on the employer. \textit{Id.} at 428. Under general tort law principles, a statute or governmental regulation may be adopted by a court as the relevant standard of care to which the defendant is held, provided that: 1) the plaintiff is within the class of people the statute or regulation sought to protect and 2) the injury suffered is the type of injury the statute sought to prevent. \textit{See id.} at 432 n.7 (citing Restatement of Torts § 286 cmt. c). The \textit{Kernan} Court held that such proof was sufficient to establish the employer's liability under FELA. \textit{Id.} at 432.

The Court recognized that liability would not be limited solely to common law tort doctrines regarding the adoption of statutory or regulatory duties as standards of care in FELA cases. \textit{Id.} Rather, the Court acknowledged that FELA liability shall be imposed upon employers when their conduct "falls short of the high standard required of [them] by [FELA]" (i.e. duty to provide safe work environment) and results in injury. \textit{Id.} at 438-39. The Court concluded that such an approach in FELA cases was consistent with "congressional intent ... to provide liberal recovery for injured workers." \textit{Id.} at 432 (citing \textit{Rogers} v. Missouri Pac. R.R., 352 U.S. 500, 508-10 (1957)).

\textsuperscript{57} \textit{Id.} at 432 (emphasis added). The Court recognized that Congress intended FELA to be merely "a framework within which the courts were left to evolve ... a system of principles providing compensation for injuries to employees." \textit{Id.} at 437. Such a system was to develop over the course of time and be responsive to the changing realities of employment in the railroad industry. \textit{Id.} For a discussion of the impact of the \textit{Kernan} decision on the current state of affairs in the railroad industry, see \textit{infra} notes 211-20 and accompanying text.
While the Supreme Court has made it clear that all physical injuries are compensable under FELA,\(^{58}\) the Court has not explicitly stated that purely emotional injuries are compensable.\(^{59}\) The Court confronted the issue of whether purely emotional injuries were cognizable under FELA in *Atchison, Topeka & Santa Fe Railway v. Buell*.\(^{60}\) In *Buell*, a railroad carman allegedly suffered an emotional breakdown as a result of unwarranted harassment by his supervisor and co-workers.\(^{61}\) Choosing to avoid the issue, the Court refused to decide whether the carman’s allegations of negligent infliction of emotional distress were within the scope of FELA.\(^{62}\) In so doing, the Court expressed an unwillingness to set forth “broad pronouncements” with regard to whether purely emotional injuries were cognizable under FELA.\(^{63}\) Instead, the *Buell* Court directed federal courts to

58. For a list of Supreme Court cases that have permitted recovery under FELA for a wide array of physical injuries, see *supra* note 45.

59. *See Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 570 (1987) (concluding that question of whether emotional injuries are cognizable under FELA is not “‘yes’ or ‘no’ answer”).

60. *Id.* at 568-70.

61. *Id.* at 559. The carman brought suit under FELA in federal district court alleging, *inter alia*, that Conrail breached its duty to provide him with a safe place to work by allowing co-workers to threaten and harass him. *Id.* Most of the alleged incidents involved the carman’s immediate supervisor. *Id.* at 559 n.1. The supervisor allegedly insisted that the carman improperly complete certain car inspection reports and steal company property from the train yard. *Id.* The carman also alleged that the supervisor repeatedly threatened to fire him and condoned conduct by co-workers designed to humiliate the carman. *Id.* Following discovery, Conrail moved for summary judgment, arguing that the Railway Labor Act precluded subject matter jurisdiction under FELA. *Id.* at 560. The district court granted Conrail’s motion and the carman appealed. *Id.*

Reversing the district court’s grant of summary judgment, the United States Court of Appeals for the Ninth Circuit held that the carman’s emotional breakdown was cognizable under FELA. *Buell v. Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320, 1323-24 (9th Cir. 1985). In so holding, the Ninth Circuit concluded that FELA “encompasses all reasonably foreseeable injuries which result from a railroad’s failure to exercise due care with respect to its employees.” *Id.* at 1322.

62. *Buell*, 480 U.S. at 570. The Court refused to address the issue because it found the record insufficient to determine whether the carman’s purely emotional injury, namely his emotional breakdown, was compensable under FELA. *Id.* at 567-68. Furthermore, the Supreme Court observed that given the posture of the case, there was no reason for the Ninth Circuit to have addressed the issue. *Id.*

63. *Id.* at 570. The Supreme Court was referring to its previous decision in *Urie*, whereby the Court held that “every injury suffered . . . by reason of the carrier’s negligence was made compensable [under FELA].” *Urie v. Thompson*, 337 U.S. 163, 181 (1949). In the appeal of *Buell* to the Ninth Circuit, the circuit court relied heavily upon the *Urie* decision to support its conclusion that all foreseeable emotional injuries are compensable under FELA. *Buell*, 771 F.2d at 1322. In light of the Ninth Circuit’s reliance on *Urie*, it is evident that the Supreme Court was hesitant to extend the broad pronouncements of *Urie* to claims brought under FELA for emotional injuries. *See Buell*, 480 U.S. at 570 (noting that question of whether one can recover for emotional injuries may not be susceptible to all-inclusive “yes” or “no” answer). For a discussion of *Buell*’s impact on the Supreme Court’s holding in *Urie*, see *infra* notes 198-201 and accompanying text. Additionally, for a discussion of *Urie*, see *supra* notes 51-54 and accompanying text.
examine the facts of each case in light of developing common law principles regarding emotional injury torts. Consequently, the Buell Court refused to establish any bright line rule with regard to emotional injuries under FELA.

B. Circuit Split Regarding Issue of Emotional Injuries

Given the Supreme Court's refusal in Buell to articulate a rule of law concerning the compensability of emotional distress claims brought under FELA, pre-Buell decisions continue to shape the debate among the circuits on the issue. Specifically, the Seventh and Ninth Circuits have created

64. Buell, 480 U.S. at 568. The Buell Court observed that "FELA jurisprudence gleaned guidance from common-law developments." Id. Consequently, the Court concluded that the determination of whether emotional injuries are compensable under FELA must be based upon the "precise application of developing legal principles to the particular facts at hand." Id. at 570.

At common law, tort actions for physical injuries were based solely upon establishing the four negligence elements of duty, breach, causation and damage. See Restatement (Second) of Torts § 281 (1977) (listing elements of cause of action for negligence). Consequently, there was little disagreement as to what legal principles should be applied to determine whether a particular physical injury was compensable under FELA. The same could not be said for tort actions involving purely emotional injuries. Tort principles for intentional or negligent infliction of emotional distress were less developed by courts and were the subject of tremendous conflict among the states. Marlowe, supra note 48, at 781 (citing W.E. Shipley, Annotation, Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong, 64 A.L.R.2d 100, 103 (1959)).

The conflict revolved around establishing some objective indicia of genuineness regarding the injury alleged by the plaintiff. Carlisle v. Consolidated Rail Corp., 990 F.2d 90, 94 (3d Cir. 1993), rev'd sub nom. Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994). Unlike physical injuries, which are observable and verifiable, emotional injuries have an intangible quality that makes them more difficult to substantiate. Edward A. McCarthy, Illinois Law in Distress: The "Zone of Danger" and "Physical Injury" Rules in Emotional Distress Litigation, 19 J. Marshall L. Rev. 17, 17-18 (1985); see Mark A. Beede, A Survey of Mental Distress Standards, 33 Me. L. Rev. 303, 306 (1981) (noting that courts are suspicious of claims for emotional injuries because they are difficult to verify). As a result, state courts have imposed additional requirements on plaintiffs asserting claims for negligent infliction of emotional distress. McCarthy, supra, at 22. These requirements, which include the physical impact rule, zone of danger requirement and bystander recovery standard, were intended to make claims for emotional injuries more objectively verifiable. Id. at 22-27; see Davies, supra note 48, at 3-4 (noting that court "hostility" concerning negligent infliction of emotional distress has lead to additional proof requirements for tort). For a discussion of the four common law standards that have been adopted regarding negligent infliction of emotional distress, see infra notes 140-45 and accompanying text.

65. Buell, 480 U.S. at 570. The Buell Court noted that most state courts have abandoned the physical impact requirement for the common law tort of negligent infliction of emotional distress. Id. at 569 n.20. In addition, the Court observed that some state courts will allow recovery for emotional injuries upon a mere showing of accompanying physical symptoms. Id. at 570 n.21.

66. See, e.g., Lancaster v. Norfolk & W. Ry., 773 F.2d 807, 813 (7th Cir. 1985) (requiring proof of physical contact or threat of physical contact for emotional distress claims brought under FELA), cert. denied, 480 U.S. 945 (1987); Buell v.
different standards for limiting the scope of recovery for negligent infliction of emotional distress: 1) the "physical impact" standard and 2) the "full recovery" standard. Under the physical impact standard, which severely limits the scope of the negligent infliction of emotional distress tort, a plaintiff may recover only for emotional injuries that are incidental to physical contact. In contrast, under the full recovery standard, a plaintiff may recover damages for emotional distress merely by establishing the traditional negligence elements of duty, breach, causation and damage.

The United States Court of Appeals for the Seventh Circuit has used the physical impact approach in cases decided both before and after Buckel. In Lancaster v. Norfolk and Western Railway, a pre-Buell decision, the Seventh Circuit held that plaintiffs alleging emotional distress must prove that their emotional injuries resulted from either "physical contact or [a] threat of physical contact." The Lancaster court reasoned that FELA was designed to encompass only those claims involving "physical" torts. After Buckel, the Seventh Circuit re-affirmed its Lancaster decision in Ray v. Consolidated Rail Corp. Accordingly, plaintiffs in the Seventh Circuit must establish physical impact or a threat of physical impact in order to recover damages under FELA for negligent infliction of emotional distress.

Atchison, Topeka & Santa Fe Ry., 771 F.2d 1320, 1324 (9th Cir. 1985) (adopting full recovery method for emotional distress claims brought under FELA), aff'd on other grounds, 480 U.S. 557 (1987). For a discussion of the Supreme Court's analysis in Buckel, see supra notes 61-65 and accompanying text.

67. See Lancaster, 773 F.2d at 813 (stating that emotional injuries are compensable under FELA only if caused by "physical contact or threat of physical contact"). For a discussion of the Seventh Circuit's physical impact standard, see infra notes 71-76 and accompanying text.

68. See Buckel, 771 F.2d at 1322 (adopting full recovery standard for emotional injury claims brought by railroad employees under FELA). For a discussion of the Ninth Circuit's approach, see infra notes 77-81.


70. See Bell, supra note 48, at 335 (noting that full recovery approach permits recovery for psychic injury caused by defendant's negligence under same circumstances in which recovery for physical injury is permitted). For a complete discussion of the full recovery approach, see infra note 79 and accompanying text.

71. For a discussion of case law in the Seventh Circuit with regard to the compensability of emotional distress under FELA, see infra notes 72-76 and accompanying text.

72. 773 F.2d 807 (7th Cir. 1985), cert. denied, 480 U.S. 945 (1987).

73. Id. at 813. For a discussion of the physical impact requirement as developed in the common law, see infra note 141 and accompanying text.

74. Lancaster, 773 F.2d at 815. The Lancaster court defined the category of physical torts as including: "assault, battery, and negligent infliction of personal injury." Id.

75. 938 F.2d 704 (7th Cir. 1991), cert. denied, 112 S. Ct. 914 (1992).

76. Id. at 705. Noting that the Supreme Court in Buckel declined to address the issue of whether emotional injuries are compensable under FELA, the Seventh Circuit has taken a different approach.

77. Atchison, Topeka & Santa Fe Ry., 771 F.2d 1320, 1324 (9th Cir. 1985).

78. Lancaster, 773 F.2d 807, 813 (7th Cir. 1985), cert. denied, 480 U.S. 945 (1987).

79. See Buckel, supra note 48, at 335 (noting that full recovery approach permits recovery for psychic injury caused by defendant's negligence under same circumstances in which recovery for physical injury is permitted). For a complete discussion of the full recovery approach, see infra note 79 and accompanying text.

80. See Bell, supra note 48, at 335 (noting that full recovery approach permits recovery for psychic injury caused by defendant's negligence under same circumstances in which recovery for physical injury is permitted). For a complete discussion of the full recovery approach, see infra note 79 and accompanying text.

81. For a discussion of case law in the Seventh Circuit with regard to the compensability of emotional distress under FELA, see infra notes 72-76 and accompanying text.
In contrast to the approach of the Seventh Circuit, the United States Court of Appeals for the Ninth Circuit has taken a progressive view of the cognizability of FELA claims for purely emotional injuries. In Buell v. Atchison, Topeka and Santa Fe Railway, which was later affirmed on other grounds by the Supreme Court, the Ninth Circuit adopted the "full recovery" standard. The "full recovery" standard permits railroad employees to recover for emotional injuries upon a mere showing of the four traditional negligence elements. The Ninth Circuit based its holding in Buell upon the Supreme Court's reasoning in Urie that "an 'injury' need not be inflicted by 'external, violent or accidental' means."

Circuit concluded that Lancaster, a pre-Buell holding, was not compromised by Buell. Consequently, the Seventh Circuit in Ray maintained that Lancaster and its progeny would remain the law of the circuit. See Gillman v. Burlington N. R.R., 878 F.2d 1020, 1023 n.2 (7th Cir. 1989) (citing Lancaster as basis for conclusion that claims for emotional distress brought under FELA require proof of physical contact or threat of physical contact); Hammond v. Terminal R.R. Ass'n, 848 F.2d 95, 96 (7th Cir. 1988) (same), cert. denied, 489 U.S. 1032 (1989). For a discussion of the physical impact requirement and its abandonment by most state courts, see infra note 141 and accompanying text.

77. See Buell v. Atchison, Topeka & Santa Fe Ry., 771 F.2d 1320, 1322 (9th Cir. 1985) (permitting "full recovery" on FELA claims for negligent infliction of emotional distress), aff'd on other grounds, 480 U.S. 557 (1987). For a discussion of the Ninth Circuit's adoption of the "full recovery" method, see infra notes 79-81 and accompanying text.

78. 771 F.2d 1320 (9th Cir. 1985), aff'd on other grounds, 480 U.S. 557 (1987).

79. Id. at 1322. Under the "full recovery" method, a plaintiff would be permitted to recover for psychic injury proximately caused by the defendant's negligence under the same conditions as would be necessary to recover for physical injury. Bell, supra note 48, at 335. It is well-settled at common law that a plaintiff must establish the tort elements of duty, breach, causation and damage in order to recover in negligence for physical injuries. See RESTATEMENT (SECOND) OF TORTS § 281 (1977) (listing elements of cause of action for negligence). Consequently, the full recovery method permits recovery for emotional injuries upon a showing of the four traditional tort elements. See Bell, supra note 48, at 335 n.8 (noting that plaintiffs could recover for emotional distress that was foreseeable result of defendant's conduct).

80. See Plaisance v. Texaco, Inc., 966 F.2d 166, 168 (5th Cir.) (noting that full recovery method allows recovery where "reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances"), cert. denied, 113 S. Ct. 604 (1992); Bell, supra note 48, at 335 n.8 (defining full recovery as requiring plaintiff to allege psychic injuries that were foreseeable result of defendant's negligence).

81. Buell, 771 F.2d at 1322 (quoting Urie v. Thompson, 337 U.S. 163, 186 (1949)). For a discussion of the factual background of Buell, see supra notes 61-62 and accompanying text.

Applying Urie to the facts of Buell, the Ninth Circuit cited as persuasive authority two cases that also applied Urie to similar factual scenarios. Id. at 1322-23 (citing Randall v. Reading Co., 344 F. Supp. 879, 881-82 (M.D. Pa. 1972) and McMillan v. Western Pac. R.R., 357 P.2d 449 (Cal. 1960)). First, in McMillan v. Western Pacific Railroad, the California Supreme Court faced the issue of whether a train dispatcher could recover under FELA for emotional injuries that were the result of highly stressful working conditions. 357 P.2d 449, 449 (Cal. 1960). Relying on Urie, the California Supreme Court expressly recognized that mental injuries were compensable under FELA. Id. at 451. The McMillan court noted that "injury" as
C. Other Circuits Indecisive as to Emotional Injuries

While some circuit courts have viewed the Supreme Court's decision in *Buell* as an open invitation to explore the possibility of whether purely emotional injuries are cognizable under FELA, few of them have shown a willingness to set forth a general rule of law. For example, although prior to *Buell*, the United States Court of Appeals for the First Circuit specifically required a showing of physical impact before emotional injuries could be recovered. Following the *Buell* decision, the First Circuit has

used in FELA "is not qualified by 'accidental' or 'bodily' or any other modifying word or words." *Id.* at 450. Second, in *Randall v. Reading Co.*, a railroad employee brought an action under FELA alleging that the railroad negligently failed to provide prompt medical treatment for a heart attack suffered by the employee. 344 F. Supp. 879, 881 (M.D. Pa. 1972). In finding such a claim to be compensable under FELA, the district court concluded that an employee need not suffer "bodily injury." *Id.* at 882.


*82. Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 360 (3d Cir. 1993) (observing that as a result of *Buell*, "federal courts are left to develop the degree to which negligent infliction of emotional distress is actionable under FELA"), rev'd, 114 S. Ct. 2396 (1994); *Plaisance v. Texaco*, Inc., 937 F.2d 1004, 1006 (5th Cir. 1991) (noting that federal courts view *Buell* "as an open invitation to the lower federal courts to explore the possibility of recovery under the FELA for a purely emotional injury"), *modified*, 966 F.2d 166 (1992); see *Puthe v. Exxon Shipping Co.*, 2 F.3d 480, 483 (2d Cir. 1993) (interpreting *Buell* decision as likely permitting recovery under FELA for emotional injuries); *Moody v. Maine Cent. R.R.*, 823 F.2d 693, 694 (1st Cir. 1987) (concluding that *Buell* opinion left door to recovery for emotional injuries slightly open).

*83. For a discussion of the ways in which various circuit courts have refused to address the issue of emotional injuries under FELA, see infra notes 84-101 and accompanying text. For example, although the First and Fifth Circuits have not foreclosed the possibility of allowing some recovery for purely emotional injuries, both circuits appear to favor the "physical impact" test for emotional injuries. See *Plaisance II*, 966 F.2d at 169 (noting that bystander recovery standard should be rejected because injuries related to such recovery do not result from physical trauma); *Moody*, 823 F.2d at 694 (noting that although *Buell* throws doubt on physical impact requirement, it does not completely open door to recovery for emotional injuries). But see *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987) (acknowledging that employee could have claim under FELA if railroad, knowing of employee's heart condition, acted negligently toward him).

*84. Bullard v. Central Vt. Ry.*, 565 F.2d 193, 197 (1st Cir. 1977). In *Bullard*, a railroad employee was working on a train that was involved in a head-on collision with another train. *Id.* at 195-96. The employee escaped serious injury because he jumped from the train just prior to the collision. *Id.* at 195. Following the collision, however, the employee joined the search for injured or dead members of the train crew. *Id.* As a result of this experience, the employee was unable to work for eleven weeks, allegedly because of, *inter alia*, the mental distress suffered as a result of his involvement in the train wreck. *Id.* at 196. The *Bullard* court concluded that the jury's award was excessive because the employee received damages for mental
acknowledged that it is unclear whether a plaintiff must prove a physical impact in order to recover for emotional injuries. As such, the First Circuit has commented that the Buell decision “throws doubt” on the strict requirement of physical impact.

Since the Buell decision, the United States Court of Appeals for the Fifth Circuit, in addition to the First Circuit, has shifted its approach concerning the issue of emotional injuries under FELA. Having overturned a previous decision that established the full recovery standard, the Fifth Circuit, unlike the First Circuit, now appears to favor the physical impact standard. In Plaisance v. Texaco, Inc. (hereinafter Plaisance I), the Fifth Circuit rejected the full recovery standard, which it had earlier adopted in Plaisance v. Texaco, Inc. (hereinafter Plaisance II). Recognizing that the distress unrelated to a physical injury or threat of physical impact. See id. at 197 (noting that jury could properly award plaintiff damages for fright experienced just before and after trains collided, but not for sadness experienced by employee regarding death of crew members). In reaching this conclusion, the court found that most common law jurisdictions allowed recovery for mental distress only when it resulted from a physical injury. Id. at 197 n.3 (citing 2 F. Harper & F. James, THE LAW OF TORTS § 18.4, at 1031-32 & n.4 (1956)). For a discussion of the jurisdictions that have in fact abandoned the physical impact requirement, see infra note 141 and accompanying text. For a discussion of the physical manifestation and severe emotional distress requirements that replaced the physical impact rule, see infra note 143.

85. Moody, 823 F.2d at 694.
86. Id. In Moody, an employee alleged that he was regularly denied admission into an engineer training program, assigned to unattractive locations and denied access to employment on certain train routes. Id. at 693. The employee claimed that as a result of such harassment, he suffered fatigue, depression and attacks of angina. Id. Consequently, the First Circuit was confronted with the issue of whether the employee’s emotional distress was compensable under FELA. Id. at 694. Initially, the Moody court recognized that its previous holding in Bullard was effectively modified by Buell. Id. The court noted that Buell “throws doubt” on the First Circuit’s holding in Bullard whereby emotional injuries are compensable under FELA only upon a showing of physical impact. Id. Concluding that the employee’s injuries were not a foreseeable result of employer negligence, however, the court found no reason to decide whether emotional injuries are cognizable under FELA. Id.

87. See Plaisance II, 966 F.2d at 169 (rejecting earlier Fifth Circuit holding that established full recovery method for emotional distress claims brought under FELA).
88. Id. at 169. For a discussion of the Fifth Circuit’s apparent change of position regarding claims for emotional injuries, see infra notes 89-92 and accompanying text.
90. 937 F.2d 1004 (5th Cir. 1991), modified, 966 F.2d 166 (1992); see Plaisance II, 966 F.2d at 167-69 (holding that negligently inflicted emotional injuries are cognizable under FELA). In Plaisance I, a seaman allegedly suffered emotional injuries when a small portion of his barge caught fire. Plaisance I, 937 F.2d at 1005. In analyzing the case law that has developed regarding FELA claims for emotional injuries, the court found that purely emotional injuries are cognizable under FELA. Id. at 1008-09. Despite this finding, however, the Plaisance I court dismissed the seaman’s appeal on the grounds that his emotional injuries were not a foresee-
appeal should have been dismissed on other grounds, the Plaisance II court concluded that the panel in Plaisance I improperly addressed the issue of whether purely emotional injuries are compensable under FELA.\textsuperscript{91} While the Fifth Circuit refused to foreclose the possibility of future recovery for purely emotional injuries, it did emphasize that, under most circumstances, purely emotional injuries are recoverable only when accompanied by physical impact or the threat of physical impact.\textsuperscript{92}

Some circuit courts have avoided the issue of whether emotional distress is cognizable under FELA by dismissing such claims on other grounds.\textsuperscript{93} In Elliot v. Norfolk & Western Railway,\textsuperscript{94} a railroad employee brought a FELA claim for negligent infliction of emotional distress in the United States Court of Appeals for the Fourth Circuit. The employee alleged that the railroad unfairly criticized her work and prosecuted unwarrantable result of a minor barge fire. Id. at 1011. Upon rehearing en banc, the Plaisance II court affirmed the decision in Plaisance I but modified the Plaisance I court's conclusion that all emotional injuries are compensable under FELA. Plaisance II, 966 F.2d at 167.

91. Plaisance II, 966 F.2d at 168-69. The Plaisance II court concurred with the Plaisance I decision that the seaman's emotional injuries were not a foreseeable result of the minor barge fire. Id. The Plaisance II court reasoned that because the seaman's emotional injuries were not foreseeable, the court in Plaisance I should not have decided whether purely emotional injuries are cognizable under FELA. Id. at 169.

92. Id. In modifying Plaisance I, the Fifth Circuit emphasized that its holding in Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989), still represents the law of the circuit regarding emotional distress claims brought under FELA. Plaisance II, 966 F.2d at 169. In Gaston, the Fifth Circuit refused to adopt the bystander recovery standard for emotional distress claims raised under FELA. Gaston, 866 F.2d at 821. The Gaston court viewed the bystander recovery standard as the first step toward allowing recovery for emotional injuries that did not result from "physical trauma." Id. at 819. In view of this, the court was unwilling to take such a step. Id.; see Plaisance II, 966 F.2d at 169 (noting that in rejecting bystander recovery, Gaston implicitly foreclosed recovery under less exacting common law standards for negligent infliction of emotional distress).

93. Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990) (finding plaintiff's emotional distress claim to be deficient because plaintiff failed to show breach of railroad's duty or existence of foreseeable emotional injury). Courts have also avoided the issue by dismissing such claims on the grounds that the claims lacked the element of foreseeability. See, e.g., Puthe v. Exxon Shipping Co., 2 F.3d 480, 483 (2d Cir. 1993) (declining to establish standards for recovery for negligent infliction of emotional distress because employee's psychological injuries were not reasonably foreseeable); Plaisance II, 966 F.2d at 168-69 (concluding that facts of case do not permit determination of whether purely emotional injuries are compensable under FELA because employee's injuries were not foreseeable result of employer's alleged negligence); Stoklosa v. Consolidated Rail Corp., 864 F.2d 425, 426 (6th Cir. 1988) (finding question of whether purely emotional injuries are compensable under FELA to be moot because plaintiff's emotional distress was not reasonably foreseeable result of legitimate disciplinary action taken by employer).

94. 910 F.2d 1224 (4th Cir. 1990).
ranted disciplinary charges against her. The Fourth Circuit dismissed the action on the grounds that the employee failed to allege "unconscionable abuse or outrageous conduct." The United States Court of Appeals for the Sixth Circuit followed a similar approach in Adams v. CSX Transportation, Inc. In Adams, a railroad employee brought a claim against CSX for emotional injuries sustained as a result of harassment by his supervisor. The Sixth Circuit held that the employee could not recover for his purely emotional injuries. The court reasoned that the employee failed to establish "unconscionable

95. Id. at 1225-27. The Elliot court saw little merit in the plaintiff’s claim, labeling her allegations "at best . . . a situation of hurt feelings and poor office relationships." Id. at 1229. The court noted that other outside pressures may have contributed to the employee’s emotional injuries. Id. at 539. The Adams court found that the employee was in the midst of an acrimonious divorce and personal bankruptcy proceedings during the time he was working under the allegedly abusive supervisor. Id.

96. Id. at 1229. Seeking to properly apply the precedent of Buell to the facts of Elliot, the Fourth Circuit examined cases in which other circuits applied Buell to similar fact patterns. Id. at 1228-29. Ultimately, the Elliot court adopted the Fifth Circuit’s interpretation of Buell, which required allegations of unconscionable abuse. Id. (citing Netto v. Amtrak, 863 F.2d 1210, 1214-15 (5th Cir. 1989)). Since the Fourth Circuit’s decision in Elliot, some circuits have questioned such an interpretation. In Puthe v. Exxon Shipping Co., the Second Circuit concluded that the unconscionable abuse requirement of Buell was only a prerequisite to recovery for intentional infliction of emotional distress. 2 F.3d 480, 483 (2d Cir. 1993) (citing Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 566 n.13 (1987)). Consequently, the "unconscionable abuse" requirement did not apply to FELA claims for negligent infliction of emotional distress. See id. (noting that "unconscionable abuse" standard discussed by Buell Court applied solely to claims for intentional infliction of emotional distress).

97. 899 F.2d 536 (6th Cir. 1990).

98. Id. at 538. The employee suffered a variety of emotional injuries including an emotional breakdown and severe depression. Id. After examining the record from the trial court, the Sixth Circuit in Adams concluded that the supervisor drove the employee to work extremely hard, but not beyond the employee’s physical capabilities. Id. Additionally, the court noted that other outside pressures may have contributed to the employee’s emotional injuries. Id. Specifically, the Adams court found that the employee was in the midst of an acrimonious divorce and personal bankruptcy proceedings during the time he was working with his allegedly abusive supervisor. Id.

99. Id. at 539. The Adams court found that the employee had failed to establish either "a breach of the [railroad’s] duty to provide an emotionally safe workplace or the foreseeability of his emotional injury." Id. With regard to the employee’s failure to establish the foreseeability element, the Adams court concluded that the railroad could not have reasonably foreseen that the employee’s work conditions would cause his emotional injuries. Id. at 540. Specifically, the court noted that the employee failed to lodge complaints about his supervisor or his working conditions. Id. The court also observed that the employee “seemed content” to work under the allegedly abusive supervisor. Id. Because the employee failed to establish a prima facie case, the court found it unnecessary to determine whether emotional injuries are cognizable under FELA. Id. at 530.
abuse” on the part of the employer, and therefore, the employee did not meet the “prerequisite[s] to recovery” for purely emotional injuries.

D. Development of Case Law in Third Circuit

Initially, the United States Court of Appeals for the Third Circuit took a cautious approach in its examination of whether emotional injuries are cognizable under FELA. Rather than adopting a “bright line” rule, the Third Circuit concluded that emotional injuries under FELA should be determined on an ad hoc basis. In Holliday v. Consolidated Rail Corp., the Third Circuit denied recovery to a train engineer for emotional injuries sustained as a result of being promoted to a job for which he felt unqualified. The Holliday court based its decision on two grounds. First, the court noted that decisions regarding employment qualifications and duties are at the heart of labor-management negotiations between the union and the railroad. Consequently, the Third Circuit was unwilling to upset the delicate balance established by the collective bargaining

100. Id. at 540. The Adams court recognized that a railroad does not breach its duty to provide an emotionally safe workplace unless the railroad engages in “unconscionable abuse.” Id. at 539 (citing Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 567 n.13 (1987)); see Netto v. Amtrak, 863 F.2d 1210, 1214 (5th Cir. 1989) (concluding that unconscionable abuse on part of employer is required to establish breach of employer’s duty to provide emotionally safe workplace). Consequently, the Adams court concluded that while the supervisor may have been overbearing, he did not engage in unconscionably abusive conduct. Adams, 899 F.2d at 540. For a discussion of whether unconscionable abuse is a prerequisite to recovery as to claims brought under FELA for negligent infliction of emotional distress, see supra note 96 and accompanying text.

101. See Adams, 899 F.2d at 539 (interpreting Buell as requiring “unconscionable abuse” as type of conduct that would amount to breach of employer’s duty to provide emotionally safe workplace).

102. For a discussion of the evolution of case law in the Third Circuit regarding emotional distress claims brought under FELA, see infra notes 103-35 and accompanying text.


105. Id. at 421-22. The train engineer was promoted to conductor and worked as a conductor. Id. at 422. Claiming that he was not properly trained to take the position as conductor, the train engineer stated that he frequently “threw the wrong switches.” Id. After seven days as a conductor, the train engineer claimed that he suffered, inter alia, heart palpitations, sleep disorder, anxiety and depression. Id.

106. Id. at 424. For a discussion regarding the basis for the court’s decision, see infra notes 107-10 and accompanying text.

107. Holliday, 914 F.2d at 424. The Holliday court found that the promotion of the train engineer to the position of conductor was a normal management decision. Id. at 425.
agreement, absent a more compelling injury to the employee.\footnote{110} Second, the Holliday court recognized that recovery for purely emotional injuries must be strictly limited to avoid the potential for fraudulent or frivolous litigation.\footnote{109} The Third Circuit reasoned that, if unchecked, employees could bring claims for emotional injuries as a result of ordinary, daily "job-related stress."\footnote{110}

The Third Circuit subsequently took a similar approach in Outten v. National Railroad Passenger Corp.,\footnote{111} once again limiting its holding to the facts of the case.\footnote{112} In Outten, the Third Circuit refused to permit recovery for emotional injuries resulting from a railroad employee's reaction to a

\footnote{108. Id. at 424. The court feared that if employers were held liable for ordinary management decisions, "the most attenuated claims could be advanced." Id. at 427. The Holliday court cited several reasons for its conclusion that the circumstances were not sufficiently compelling to justify an intrusion into the labor-management relationship. Id. at 425-26. First, the conductor's position was, in some respects, similar to that of his previous position as a brakeman. Id. at 425. Second, the train engineer's exposure to the allegedly stressful working conditions lasted less than a week. Id. Finally, the train engineer suffered no physical injuries. Id. at 426; see Lancaster v. Norfolk & W. Ry., 773 F.2d 807, 813 (7th Cir. 1985) (denying recovery for FELA claim of negligent infliction of emotional distress because it involved "too much- not too dangerous- work"), cert. denied, 480 U.S. 945 (1987).

109. Holliday, 914 F.2d at 424 (citing Lancaster v. Norfolk & W. Ry., 773 F.2d 807, 813 (7th Cir. 1985)).}

\footnote{110. Id. (quoting Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1090 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990)). The Holliday court adopted the analysis of the district court in Kraus v. Consolidated Rail Corp. Id. In Kraus, a train dispatcher alleged that he suffered emotional injuries as a result of highly stressful working conditions. Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073, 1075-76 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990). The dispatcher claimed that his employer breached its duty to provide a safe workplace by forcing him to withstand a heavy workload and chaotic working conditions. Id. In holding that the dispatcher's emotional injuries were not compensable under FELA, the Kraus court concluded that "[j]ob-related stress is simply not the type of problem intended to be dealt with by the FELA." Id. at 1090. Essentially, the Kraus court viewed job-related stress as merely a normal part of the employment experience. See id. (noting that people in all walks of life face stressful work conditions on daily basis). The court maintained that if such claims were cognizable under FELA, then any employee could potentially assert a claim for job-related stress. See id. (observing that Congress did not intend to single out railroad workers as worthy of special protection from job-related stress). The Kraus court was unwilling to extend the scope of FELA to job-related stress because it feared: "(1) incalculable and potentially unlimited damages, (2) a flood of litigation brought by disenchanted workers, and (3) fraud." Id.}

\footnote{111. 928 F.2d 74 (3d Cir. 1991).}

\footnote{112. Id. at 79.}
train wreck that occurred over a mile away. The *Outten* court reasoned that enlarging the scope of FELA to encompass stress-related illnesses could result in a flood of litigation and potentially unlimited liability for railroads.

Despite the conservative holdings of *Holliday* and *Outten*, the Third Circuit ultimately decided that emotional injuries are recoverable under FELA when accompanied by physical manifestations. In *Gottshall v. Consolidated Rail Corp.*, an employee suffered stress disorder and other physical ailments as a result of his participation in events surrounding the work-related death of a co-worker. While recognizing the policy con-

113. *Id.* at 75. Essentially, the employee was alleging that his knowledge of the imminent train wreck caused his emotional injuries. *Id.* Specifically, the employee knew that two trains were on the same track and were heading toward one another. *Id.* The employee claimed that as a result of this knowledge, he feared that the collision would occur in the area where he was working and would kill him. *Id.* In actuality, the train wreck occurred over a mile away. *Id.* The employee neither witnessed the train collision nor was his safety threatened by the accident. *Id.* at 76.

The *Outten* court dismissed the employee's claim for negligent infliction of emotional distress on several grounds. *Id.* at 78-79. First, the employee was not within the zone of danger because he was greater than a mile away from the scene of the train wreck. *Id.* at 78. Second, the employee failed to meet the necessary elements for bystander recovery on a claim for negligent infliction of emotional distress because the employee was not near the scene of the train wreck, nor was he closely related to injured victims. *Id.* Finally, the *Outten* court found that the employee's emotional injuries were not the foreseeable result of the railroad's alleged negligence. *Id.* at 79. The court concluded that it was hardly foreseeable that a railroad employee "might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away." *Id.*

114. *Id.* at 79. As in *Holliday*, the Third Circuit was concerned about the possibility of creating excessive liability for railroads by allowing employees to bring attenuated claims under FELA for emotional distress. *Id.* The *Outten* court reasoned that if the employee in the present case could recover for emotional injuries, then there would be no realistic boundaries imposed on FELA. *Id.* Consequently, railroads would be liable for every possible distressful event to which an employee is exposed. *Id.*

115. See *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993) (holding that emotional injuries are compensable in certain circumstances when accompanied by physical manifestations), *rev'd*, 114 S. Ct. 2396 (1994). The *Gottshall* holding was essentially limited to the facts of the case:

[It is important that we spell out what we are not holding. We are not holding that a railroad breaches a duty of care when it works its men in hot weather. We are not holding that an employer must refrain from pushing its men to do hard labor. We are not holding that every employee who suffers emotional injuries as a result of the railway employer's conduct has a valid FELA claim. ... We [are] simply hold[ing] that considering the totality of these extreme facts in the light most favorable to Gottshall ... [his] claim has sufficient indicia of genuineness.]

*Id.* at 382-83.


117. *Id.* at 358-60. The plaintiff-employee and his deceased co-worker were members of a work gang that frequently repaired sections of track in remote locations. *Id.* at 358. On the day at issue, the crew was allegedly forced to work in extremely hot and humid conditions, despite the strenuous nature of the repair
cerns articulated in *Holliday* and *Outten*, the Third Circuit found that the tort concepts of duty, foreseeability and proximate cause established more equitable limits on liability for emotional injuries. The *Gottshall* court emphasized that federal courts should not shirk the responsibility of ensuring a remedy for victims of genuine emotional injuries because “[i]t is

work. *Id.* Most of the men in the crew were not in good physical condition, and the plaintiff’s co-worker was known to have a heart condition. *Id.*

The plaintiff claimed that the crew chief worked the men unusually hard and permitted few rest and water breaks. *Id.* Allegedly as a result of the extreme weather conditions, the relentless work-pace, the co-worker’s heart condition and the remoteness of the worksite, the co-worker suffered a fatal heart attack. *Id.* at 358-59. The plaintiff attempted to revive his co-worker as the crew chief futilely sought medical assistance. *Id.* Upon confirmation of the co-worker’s death, the crew chief ordered the plaintiff and the rest of the crew to move the body to the side of the tracks and return to work. *Id.* at 359. The crew members worked the next three hours on the track in full view of the corpse. *Id.* In the days following his co-worker’s death, the plaintiff began to fear that the extreme weather conditions would also kill him. *Id.*

The plaintiff brought an action under FELA, alleging that his participation in the events surrounding the death of his friend and co-worker caused him to suffer major depression and post-traumatic stress disorder. *Id.* at 360. The district court dismissed the plaintiff’s claim on the ground that the alleged emotional injuries were not compensable under FELA. *Id.* Construing the facts in the light most favorable to the plaintiff, the Third Circuit reversed the district court, concluding that genuine issues of material fact existed as to whether Conrail breached its duty to provide the plaintiff with a safe workplace. *Id.* at 382-83. Specifically, the Third Circuit reasoned that the plaintiff’s claim presented a genuine issue of material fact as to whether Conrail’s negligence was responsible, within the scope of FELA, for his injuries. *Id.* The court specifically cited evidence that the plaintiff was forced to witness and participate in the events surrounding his co-worker’s death as important factors. *Id.*

118. *Id.* at 380. The *Gottshall* court recognized the strong policy reasons for precluding claims for “every possible distressful happening to which a railroad worker is exposed.” *Id.* (quoting *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 79 (3d Cir. 1991)). For a discussion of the policy concerns articulated by the *Outten* and *Holliday* courts, see *supra* notes 109-10 & 114 and accompanying text.

119. *Gottshall*, 988 F.2d at 379-81. The *Gottshall* court was not gravely concerned about frivolous claims brought under FELA for trivial emotional disturbances or stress from ordinary working conditions. *Id.* The court reasoned that potential liability for frivolous claims can be properly limited through the application of the traditional elements of tort law. *Id.* The court concluded that the concepts of duty, foreseeability and proximate cause provide an effective balance between the interests of the injured party to seek just compensation and the interests of society to prevent exposure to unlimited liability. *Id.*

The *Gottshall* court was careful to limit the scope of its holding in two respects. First, the *Gottshall* court emphasized that its holding was limited to the extreme circumstances of the case and was not to be extended to all claims for emotional injuries that are the result of employer negligence. *Id.* at 382. Second, the court only recognized a cause of action under FELA for emotional injuries that are accompanied by physical manifestations, leaving open the issue of whether purely emotional injuries are compensable under FELA. *Id.* at 373-74.
the business of the courts to make precedent where a wrong calls for redress."120

III. Analysis of Carlisle v. Consolidated Rail Corp.

A. Facts and Procedural History

In Carlisle v. Consolidated Rail Corp., plaintiff Alan Carlisle worked for Conrail in the train dispatcher's office.121 As a dispatcher, Carlisle was responsible for controlling railway traffic consisting primarily of trains carrying passengers, cargo and hazardous materials.122 Prior to 1984, Conrail normally had eleven dispatchers assigned to each work shift.123 In 1984, however, Conrail sharply reduced the size of the shifts to four dispatchers.124 Consequently, the responsibilities of Carlisle and the other dispatchers increased dramatically.125 Along with the additional responsibility, Carlisle came under constant pressure to keep the trains running on time.126 Moreover, Carlisle was repeatedly instructed by Conrail to ignore the heightened safety risks precipitated by Conrail's aging railstock and outdated switching equipment.127 During this time, Carlisle worked long and erratic hours and began to experience fatigue, headaches, depression and substantial weight-loss.128 Finally, in 1988, Carlisle suffered a nervous breakdown and was unable to return to his position as a dispatcher.129

Carlisle subsequently brought an action against Conrail for negligent infliction of emotional distress pursuant to FELA.130 Carlisle alleged that Conrail "breached its duty to provide a safe workplace by requiring him to work under unreasonably stressful and dangerous conditions."131 Carlisle further alleged that, as a result of Conrail's negligence, he suffered emotional injuries, including a nervous breakdown.132

120. Id. at 381 (quoting William Prosser, Law of Torts § 54, at 360 (5th ed. 1984)).
122. Id. at 92.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id. In support of his claim that he worked long hours, Carlisle testified that he worked shifts in excess of 12 hours for 15 consecutive days. Id.
129. Id.
130. Id. at 91-92.
131. Id. at 92.
132. Id. The Carlisle court concluded that an emotional breakdown was sufficient to establish physical manifestations of emotional injuries. Id. The court refused to decide, however, whether emotional injuries without physical manifestations are compensable. Id. at 97 n.11.
Following a jury trial, Carlisle was awarded $386,500 in damages. Conrail moved for judgment notwithstanding the verdict on the grounds that Carlisle's emotional injuries were not cognizable under FELA. The district court denied the motion and Conrail subsequently appealed to the Third Circuit.

B. Work-Related Stress Claims Cognizable Under FELA

1. FELA Jurisprudence

The Carlisle court initially examined FELA jurisprudence to determine whether work-related emotional distress is compensable under FELA. The court recognized that "FELA jurisprudence 'gleans guidance from common law developments.'" Examining the development of common law negligence, the court found that the tort of negligent infliction of emotional distress did not exist at the time of FELA's enactment. The court further noted that although states use various threshold tests and limitations, all states currently recognize such a tort.

The Carlisle court observed that most states have adopted one of four basic common law standards for testing the genuineness of claims.
These common law standards are: 1) the physical impact test, 2) the zone of danger test, 3) the physical manifestation test and 4) the "relative

140. Carlisle, 990 F.2d at 94. Courts developed these common law standards to artificially limit the potential scope of the tort of negligent infliction of emotional distress by preventing fraudulent claims. Id. As such, courts viewed objective evidence of emotional injury as a way to protect against fraudulent claims. Id. For example, courts viewed evidence of physical injury as an objective basis for verifying the existence of emotional injuries. Beede, supra note 64, at 306; Marlowe, supra note 48, at 784.

141. Carlisle, 990 F.2d at 94. The Carlisle court defined the physical impact rule as allowing recovery only where the plaintiff's emotional injuries were incidental to physical contact. Id. The court in Carlisle noted that courts at common law created the physical impact standard in response to perceived concerns about: 1) difficulty of proof; 2) fear of fraudulent claims; 3) flood of litigation; and 4) potential for unlimited liability. Beede, supra note 64, at 307.

Only the Seventh Circuit explicitly requires the proof of "physical impact" as a prerequisite to recovery under FELA for negligent infliction of emotional distress. Carlisle, 990 F.2d at 95. For a discussion of the development of the Seventh Circuit's case law regarding emotional injury claims brought under FELA, see supra notes 71-76 and accompanying text. The Fifth Circuit has also indicated that it might require some proof of physical impact before allowing recovery for emotional injury claims brought under FELA. Plaisance v. Texaco, Inc., 966 F.2d 166, 169 (5th Cir.), cert. denied, 113 S. Ct. 604 (1992). For a discussion of the recent developments in the Fifth Circuit's case law, see supra notes 87-92 and accompanying text.

Ironically, most state courts have abandoned the physical impact requirement for negligent infliction of emotional distress. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570 n.2 (1987) (citing state courts that have abandoned physical impact requirement); see Marlowe, supra note 48, at 792 n.59 (identifying just five states that use physical impact as primary limitation device for mental distress actions). For a discussion of why common law developments regarding negligent infliction of emotional distress are relevant to the issue of whether emotional injuries are compensable under FELA, see supra note 64 and accompanying text. For a review of jurisdictions that have adopted more liberal standards of recovery for negligent infliction of emotional distress, see infra notes 143-228 and accompanying text.

142. Carlisle, 990 F.2d at 94. The Carlisle court noted that the zone of danger test allows recovery for negligent infliction of emotional distress in the absence of physical contact when the plaintiff's emotional injuries arise from the threat of physical harm. Id. The zone of danger test attempts to achieve policy goals similar to the physical impact standard. Id. For a discussion of the policy goals of the physical impact standard, see supra note 141. Many jurisdictions have adopted the zone of danger test in place of the more restrictive physical impact standard. Marlowe, supra note 48, at 794. However, the zone of danger test has been criticized as denying recovery for deserving plaintiffs. Beede, supra note 64, at 313-14. In particular, critics of the test have argued that, similar to the physical impact test, the zone of danger test sets arbitrary limits to recovery. Id. For example, under the zone of danger test recovery for emotional injuries "does not extend to those individuals who are foreseeably psychologically affected" by a defendant's negligent conduct. Marlowe, supra note 48, at 794.

143. Carlisle, 990 F.2d at 94. Under the physical manifestation test, recovery for negligent infliction of emotional distress is allowed if the emotional injuries are accompanied by some physical injury. Id. Many courts have allowed recovery in situations where there was little concern for unlimited liability or fraudulent claims. Marlowe, supra note 48, at 801. In fact, a review of the common law indi-
icates that a majority of states permit recovery for negligent infliction of emotional distress upon a showing of “physical manifestations.” See Keck v. Jackson, 595 P.2d 668, 669 (Ariz. 1979) (mental anguish is recoverable where, inter alia, shock or mental anguish is manifested by physical injury); Towns v. Anderson, 579 P.2d 1163, 1164-65 (Colo. 1978) (finding physical manifestations of emotional injuries, including nightmares, sleepwalking, nervousness and irritability, were sufficient to allow recovery for serious emotional injuries); Robb v. Pennsylvania R.R., 210 A.2d 709, 715 (Del. 1965) (holding that plaintiff could recover for physical injuries resulting from fright proximately caused by defendant's negligence); Gilper v. Kiamesha Concord, Inc., 302 A.2d 740, 745 (D.C. 1973) (noting that negligently caused mental disturbance must be traced to substantial physical injury); Champion v. Gray, 478 So. 2d 17, 20 (Fla. 1985) (finding that plaintiff states cause of action for negligent infliction of emotional distress when psychic injuries are evidenced by significant discernible physical injury); Hamilton v. Powell, Goldstein, Frazer & Murphy, 311 S.E.2d 818, 819 (Ga. 1984) (recognizing that for plaintiff to recover for negligent infliction of mental distress, plaintiff must prove physical injury); Hatfield v. Max Rouse & Sons N.W., 606 P.2d 944, 954-55 (Idaho 1980) (requiring emotional distress to be accompanied by physical manifestations as prerequisite to recovery); Charlie Stuart Oldsmobile, Inc. v. Smith, 357 N.E.2d 247, 253 (Ind. Ct. App. 1976), vacated in part, 369 N.E.2d 947 (1977) (stating general rule that mental suffering must be accompanied by physical injury); Hoard v. Shawnee Mission Medical Ctr., 662 P.2d 1214, 1219-20 (Kan. 1983) (acknowledging that recovery for emotional distress caused by negligence of defendant not permitted unless accompanied by physical injury); Payton v. Abbott Labs, 437 N.E.2d 171, 174 (Mass. 1982) (holding that plaintiff must prove that emotional injury was accompanied by physical harm manifested by objective symptomatology in order to recover for negligent infliction of emotional distress); Vance v. Vance, 408 A.2d 728, 730, 734 (Md. 1979) (concluding that plaintiff who suffered emotional collapse, depression and evidenced symptoms of ulcer and insomnia established requisite physical manifestations sufficient to allow recovery for negligent infliction of emotional distress); Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970) (recognizing that where definite and objective physical injury is produced as result of emotional distress proximately caused by defendant's negligent conduct, plaintiff may recover in damages for such physical consequences notwithstanding absence of physical impact); Okrina v. Midwestern Corp., 165 N.W.2d 259, 263 (Minn. 1969) (finding that plaintiff who had severe and persistent physical disability resulting from fright had right of recovery); Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 71 (Miss. 1980) (requiring proof of physical injury or genuine physical consequences before permitting recovery for negligently inflicted mental distress); Corso v. Merrill, 406 A.2d 300, 304 (N.H. 1979) (noting that emotional harm must be painful mental experience with lasting effects and that psychic injury must manifest itself by way of physical symptoms); Falzone v. Busch, 214 A.2d 12, 17 (N.J. 1965) (allowing recovery for mental distress manifested by “[s]ubstantial bodily injury or sickness”); Jines v. City of Norman, 351 P.2d 1048, 1052 (Okla. 1960) (concluding that there can be no recovery for mental pain and anguish that is not connected with some physical suffering); Melton v. Allen, 580 P.2d 1019, 1021-22 (Or. 1978) (recognizing that plaintiff must prove physical injury or physical consequences in order to recover on claim of negligent infliction of emotional distress); Banyas v. Lower Bucks Hosp., 437 A.2d 1236, 1239 (Pa. Super. Ct. 1981) (recognizing that physical impact from negligent source is requisite element to tort of negligent infliction of emotional distress); Reilly v. United States, 547 A.2d 894, 895 (R.I. 1988) (acknowledging that physical symptomatology of emotional distress is necessary for recovery for negligent infliction of emotional distress); Dooley v. Richland Memorial Hosp., 322 S.E.2d 669, 671 (S.C. 1984) (requiring objective evidence of physical injury upon which to base claim for emotional injuries); Chisum v. Behrens, 283 N.W.2d 235, 240 (S.D. 1979) (noting well-established rule that damages for mental anguish cannot be sustained where there is no evidence
bystander" test. The court recognized that each of these standards requires "some external indicia" to authenticate the harm suffered.

Following its survey of state common law, the Carlisle court examined the United States Supreme Court's decision in Buell. The court first recognized that the Supreme Court declined to decide whether purely emotional injuries are cognizable under FELA. The Carlisle court then surmised that this refusal to decide the issue was due, in part, to the broad

of accompanying physical injury); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 433-34 (Tenn. 1982) (holding that emotional distress resulting from mistaken belief that contamination of household water supply would result in physical injury to plaintiff and family was actionable at common law); Farmers & Merchants State Bank of Krum v. Ferguson, 617 S.W.2d 918, 921 (Tex. 1981) (recognizing that damages for mental anguish are recoverable upon showing of accompanying physical injury); Hughes v. Moore, 197 S.E.2d 214, 219 (Va. 1973) (holding that emotional distress is recoverable in the absence of physical impact when accompanying physical injury was result of fright or shock); Hunsley v. Giard, 553 P.2d 1096, 1103 (Wash. 1976) (en banc) (requiring "objective symptomatology" of emotional distress before permitting recovery for negligent infliction of emotional distress); Meracle v. Children's Serv. Soc'y of Wis., 437 N.W.2d 592, 595 (Wis. 1989) (noting that general rule in Wisconsin is to allow recovery for negligent infliction of emotional distress where emotional distress is manifested by physical injury); c.f. M.B.M. Co. v. Counce, 596 S.W.2d 681, 687 (Ark. 1980) (permitting recovery for intentional infliction of emotional distress when distress is accompanied by physical manifestations).

The Restatement (Second) of Torts states that physical manifestations included "long continued nausea or headaches... and even long continued mental disturbance, as for example... repeated hysterical attacks or mental aberrations." The relative bystander test expands the scope of liability beyond the immediate zone of danger to encompass those who witness the physical injury of a closely related family member. See id. (describing relative bystander test as requiring that plaintiff witness injury of close relative). The landmark case of Dillon v. Legg, 441 P.2d 912 (Cal. 1968), first established the specific elements for bystander recovery. These elements are: 1) the plaintiff was near scene of accident, 2) the plaintiff's shock resulted from direct emotional impact caused by sensory and contemporaneous observance of the accident and 3) the plaintiff was closely related to the victim. McCarthy, supra note 64, at 27 (citing Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968). Since the California Supreme Court's decision in Dillon, several states have adopted the Dillon criteria verbatim or in a slightly modified form. See Marlowe, supra note 48, at 807 (observing that nine states have adopted Dillon elements nearly verbatim while six states have added "objectively serious injury" requirement to Dillon criteria).

144. Carlisle, 990 F.2d at 94. The relative bystander test expands the scope of liability beyond the immediate zone of danger to encompass those who witness the physical injury of a closely related family member. See id. (describing relative bystander test as requiring that plaintiff witness injury of close relative). The landmark case of Dillon v. Legg, 441 P.2d 912 (Cal. 1968), first established the specific elements for bystander recovery. These elements are: 1) the plaintiff was near scene of accident, 2) the plaintiff's shock resulted from direct emotional impact caused by sensory and contemporaneous observance of the accident and 3) the plaintiff was closely related to the victim. McCarthy, supra note 64, at 27 (citing Dillon v. Legg, 441 P.2d 912, 920 (Cal. 1968). Since the California Supreme Court's decision in Dillon, several states have adopted the Dillon criteria verbatim or in a slightly modified form. See Marlowe, supra note 48, at 807 (observing that nine states have adopted Dillon elements nearly verbatim while six states have added "objectively serious injury" requirement to Dillon criteria).

145. Carlisle, 990 F.2d at 94. The Third Circuit in Carlisle concluded that courts developed the common law standards in response to judicial suspicion as to the risks of fraud and exaggerated emotional distress claims. Id.

146. Id. at 94-95. For a discussion of the Supreme Court's decision in Buell and its prior holdings in Urie and Kernan, see supra notes 49-65 and accompanying text.

147. Carlisle, 990 F.2d at 94 (citing Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570 (1987)).
divergence among states regarding the standards of recovery for emo-
tional injury torts.\textsuperscript{148}

The \textit{Carlisle} court recognized that, as a result of the \textit{Buell} decision, the
 circuit courts have no clear direction as to whether emotional distress
 claims are cognizable under FELA.\textsuperscript{149} Furthermore, the court noted that
 the Supreme Court in \textit{Buell} directed the circuit courts to apply evolving
 common law principles of torts rather than establishing an "all-inclusive"
 rule of law as to the compensability of emotional injuries.\textsuperscript{150} Examining
 the conflicting decisions rendered by the circuit courts in the aftermath of
 \textit{Buell}, the \textit{Carlisle} court concluded that "no common discernable principle"
 has developed among the federal circuits.\textsuperscript{151}

The \textit{Carlisle} court specifically cited the conflicting positions of the Sev-
 enth and Ninth Circuits as exemplifying the lack of consensus among the
 circuits regarding recovery for emotional injuries.\textsuperscript{152} The \textit{Carlisle} court
 noted that the Seventh Circuit requires physical impact to accompany
 emotional distress, while the Ninth Circuit allows full recovery for purely
 emotional injuries.\textsuperscript{153} Ultimately, the Third Circuit in \textit{Carlisle}
 characterized the differences among federal circuits as reflecting an inherent
tension between FELA's mandate for expanding recovery standards and
courts' concerns about excessive or frivolous litigation.\textsuperscript{154}

\begin{footnotes}
\textsuperscript{148}. \textit{Id.} The \textit{Carlisle} court also cited the inadequacy of the record in the \textit{Buell}
case as another reason why the Supreme Court declined to decide whether emo-
tional injuries were compensable under FELA. \textit{Id.}

\textsuperscript{149}. \textit{Id.} at 95. For a discussion of the positions taken by various circuits on
the issue of compensability of injuries under FELA, see \textit{supra} notes 66-101 and
accompanying text.

\textsuperscript{150}. \textit{Carlisle}, 990 F.2d at 94. Specifically, the \textit{Carlisle} court referred to the gui-
dance of the Supreme Court in \textit{Buell} that "broad pronouncements . . . may have to
bow to the precise application of developing legal principles to the particular facts
at hand." \textit{Id.} (quoting Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570
(1987)).

\textsuperscript{151}. \textit{Id.} at 95 (quoting Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 365
(3d Cir. 1993), \textit{rev'd}, 114 S. Ct. 2396 (1994)). For a discussion of the conflicting
positions taken by the Seventh and Ninth Circuits, see \textit{supra} notes 71-81 and
accompanying text.

\textsuperscript{152}. \textit{Carlisle}, 990 F.2d at 95.

\textsuperscript{153}. \textit{Id.} For a discussion of the Seventh Circuit's holding in \textit{Lancaster and
Ray}, see \textit{supra} notes 71-76 and accompanying text. Additionally, for a discussion of
the Ninth Circuit's holding in \textit{Buell}, see \textit{supra} notes 77-81 and accompanying text.

\textsuperscript{154}. \textit{Carlisle}, 990 F.2d at 95. The \textit{Carlisle} court noted that Congress did not
intend FELA to be a static remedy, but one which should be developed and
enlarged. \textit{Id.} (citing Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958)).
The court contrasted this broad mandate of FELA with common law limitations
imposed on the tort of negligent infliction of emotional distress. \textit{Id.} The limita-
tions reflect concerns about a flood of baseless litigation resulting from unre-
strained emotional distress claims. \textit{Id.} at 94-95.
\end{footnotes}
2. **Third Circuit Precedent**

The *Carlisle* court proceeded to examine Third Circuit precedent addressing recovery for purely emotional injuries under FELA.\textsuperscript{155} Citing the circuit's holdings in *Outten* and *Holliday*, the court observed that in both instances, the circuit's refusal to allow the plaintiff to recover for purely emotional injuries was limited to the facts of each case.\textsuperscript{156} The *Carlisle* court further noted that its recent holding in *Gottshall* permitted recovery under FELA for emotional distress without any proof of physical impact.\textsuperscript{157}

The *Carlisle* court next considered whether Congress intended FELA to encompass job-related stress.\textsuperscript{158} The court initially focused on the holding of the District Court for the Eastern District of Pennsylvania in *Kraus v. Consolidated Rail Corp.*.\textsuperscript{159} The district court in *Kraus* reasoned that job-related stress was not intended to be within the scope of FELA because "most state and federal . . . [courts] required allegations of specific physical impact."\textsuperscript{160}

The *Carlisle* court rejected the rationale set forth in *Kraus* and found that the wording of FELA "was not restrictive as to . . . the particular kind of injury resulting."\textsuperscript{161} The Third Circuit further reasoned that under this interpretation of FELA, emotional and physical injuries that are the foreseeable result of employer negligence are cognizable under FELA.\textsuperscript{162} The *Carlisle* court made it clear that employer negligence includes circumstances in which workers are required to remain in unreasonably dangerous and stressful work conditions for significant periods of time.\textsuperscript{163}

\textsuperscript{155} *Id.* at 95-96. The *Carlisle* court noted that indecision existed within the Third Circuit as to whether FELA permits recovery for claims of emotional distress. *Id.*

\textsuperscript{156} *Id.* at 96-97. For a discussion of the *Holliday* and *Outten* decisions, see *supra* notes 102-14 and accompanying text.

\textsuperscript{157} *Carlisle*, 990 F.2d at 96. The *Gottshall* decision represented the first time that the Third Circuit allowed recovery for emotional injuries without proof of physical impact. *Id.* The *Gottshall* court's holding, however, was limited to emotional injuries manifested by some resulting physical injury. *Id.* For a discussion of the *Gottshall* decision, see *supra* notes 117-20 and accompanying text. Similarly, in *Carlisle*, the court found the train dispatcher's emotional injuries to be substantiated by physical manifestations. *Carlisle*, 990 F.2d at 97 n.11. As a result, the *Carlisle* court also refused to decide whether purely emotional injuries are compensable under FELA. *Id.*

\textsuperscript{158} *Carlisle*, 990 F.2d at 97.

\textsuperscript{159} *Id.* For a discussion of the *Kraus* holding, see *supra* note 110.

\textsuperscript{160} *Carlisle*, 990 F.2d at 96 (quoting *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1075, 1089-90 (E.D. Pa. 1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir. 1990)).

\textsuperscript{161} *Id.*, 990 F.2d at 96 (quoting *Urie v. Thompson*, 337 U.S. 163, 181 (1949)). For a discussion of the *Urie* decision, see *supra* notes 51-54 and accompanying text.

\textsuperscript{162} *Carlisle*, 990 F.2d at 96.

\textsuperscript{163} *Id.*
The Carlisle court next emphasized that its decision to permit recovery under FELA for work-related stress was "not inconsistent" with Third Circuit precedent.164 The court noted that the Third Circuit's holding in Holliday did not contemplate the factual circumstances of "protracted" exposure to "dangerous conditions."165 As such, the Carlisle court concluded that Holliday did not apply to the facts of Carlisle.166 Moving next to the Third Circuit's holding in Outten, the Carlisle court distinguished Outten as involving injuries that were not the foreseeable result of the employer's alleged negligence.167 Finally, the Carlisle court cited the Gottshall decision, which permitted recovery of emotional injuries under certain circumstances, as a basis for extending the scope of FELA to claims for work-related stress.168

In expanding its interpretation of FELA to include the facts of Carlisle, the court highlighted three factors supporting the position that Conrail had ample notice of the stressful and dangerous conditions imposed on the plaintiff.169 First, the plaintiff had lodged complaints with Conrail regarding the stressful working conditions.170 Second, other train dispatchers had previously suffered a variety of emotional problems.171 Third, government reports documented the stressful nature of the train dispatcher's job by criticizing the outdated equipment and hazardous working conditions in the dispatcher's office.172 The Carlisle court ultimately

164. Id.
165. Id. (quoting Holliday v. Consolidated Rail Corp., 914 F.2d 421, 426-27 (3d Cir. 1990), cert. denied, 498 U.S. 1090 (1991)).
166. See id. (citing language in Holliday opinion that leaves open question of whether FELA permits recovery for emotional injuries resulting from exposure by railroad employee to "dangerous conditions for a protracted time").
167. Id. at 96-97.
168. Id. at 97-98. For a general discussion of Gottshall, see supra notes 117-20 and accompanying text.
169. Carlisle, 990 F.2d at 97. The court was resolute in its efforts to ensure that railroads are liable only for those employee injuries that are the foreseeable result of employer negligence. See id. (requiring that emotional injuries are foreseeable result of extended exposure to stressful working conditions). In addition to emphasizing that the emotional injuries must be reasonably foreseeable, the Carlisle court also required evidence of "extended exposure" to the stressful conditions. Id. The extended exposure requirement provides railroads with a reasonable opportunity to discover the dangerous and stressful working conditions and to remedy the situation. See id. (noting that railroad had prior notice of hazardous working conditions through official governmental reports and prior complaints from other train dispatchers).
170. Id.
171. Id. The depositions of the plaintiff's fellow workers were introduced into evidence at trial. Id. These depositions revealed that the co-workers who had jobs as dispatchers suffered cardiac arrest, nervous breakdowns and depression. Id.
172. Id. at 93. The reports were prepared by the Federal Railway Administration, a governmental agency that monitors the railroad industry. Id. at 97. The Carlisle court also noted that Conrail's railstock was aging and its switching equipment was outdated. Id. at 92.
concluded from these facts that Conrail had breached its duty to provide the plaintiff with a safe workplace.\textsuperscript{173}

IV. CRITICAL ANALYSIS

A. Carlisle Court Strikes Equitable Compromise

In addressing the issue of recovery for emotional injuries under FELA, the \textit{Carlisle} court recognized that two competing interests were at stake.\textsuperscript{174} On the one hand, the court acknowledged the interests of employees who fall victim to dangerously stressful working conditions and whose only recourse is to pursue a cause of action under FELA.\textsuperscript{175} On the other hand, the court recognized the interests of employers who face potentially unlimited liability for work-related stress claims, which threaten the financial stability of the railroad industry.\textsuperscript{176} With these considerations in mind, the \textit{Carlisle} court carefully restricted recovery for work-related stress to instances in which "it is \textit{reasonably} foreseeable that \textit{extended} exposure to \textit{dangerous} and \textit{stressful} working conditions" will cause injury to a railroad employee.\textsuperscript{177} Consequently, the court's analysis struck an equitable balance between the legitimate interests of both labor and management concerning FELA.\textsuperscript{178}

With regard to the interests of labor, the \textit{Carlisle} holding affords employees a source of protection from prolonged exposure to dangerously stressful working conditions.\textsuperscript{179} Employees benefit from such protection

\textsuperscript{173} \textit{Id.} at 98.

\textsuperscript{174} \textit{See id.} at 95 (recognizing that expansive interpretation of FELA must be reconciled with fear of unlimited liability for emotional distress claims).

\textsuperscript{175} \textit{See id.} at 96 (concluding that emotional injuries that are foreseeable result of extended exposure to dangerous work-related stress are compensable under FELA); Phillips, \textit{supra} note 21, at 50 (recognizing that Congress passed FELA to provide railroad employees reasonably reliable tort compensation system).

\textsuperscript{176} \textit{See Carlisle}, 990 F.2d at 94-95 (noting concern about potential for flood of litigation and unlimited liability arising from unrestrained emotional distress claims). The primary interest at stake for the railroad industry is the containment of liability under FELA. Taylor, \textit{supra} note 20, at 27; \textit{see Outten v. National R.R. Passenger Corp.}, 928 F.2d 74, 79 (3d Cir. 1991) (concluding that there must be realistic boundaries on FELA claims to prevent excessive liability for unlimited emotional distress claims); Holliday v. Consolidated Rail Corp., 914 F.2d 421, 423 (3d Cir. 1990) (noting that emotional injury claims under FELA must be limited to avoid flood of claims by disenchanted workers), \textit{cert. denied}, 498 U.S. 1090 (1991); Phillips, \textit{supra} note 21, at 50 (noting railroad industry's fear of burgeoning claims for occupational disease). For a discussion of the potential liability that could result from unrestrained work-related stress claims, see \textit{infra} note 244 and accompanying text.

\textsuperscript{177} \textit{Carlisle}, 990 F.2d at 97 (emphasis added).

\textsuperscript{178} For a detailed discussion of how the interests of both labor and management were protected by the \textit{Carlisle} holding, see \textit{infra} notes 182-97 and accompanying text.

\textsuperscript{179} \textit{See Carlisle}, 990 F.2d at 97 (holding that employer is liable under FELA when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to railroad worker).
in two ways. First, the victims of serious work-related stress have the opportunity to seek just compensation under FELA for their emotional injuries. Second, employers who become aware of this potential liability are likely to establish mechanisms that identify and correct dangerously stressful working conditions.

With regard to the interests of management, the Carlisle holding protects railroad employers from the threat of unlimited liability for injuries resulting from work-related stress. In general, judicial concerns regarding unlimited liability for work-related stress claims brought under FELA differ significantly from the common law fear of unlimited liability for negligent infliction of emotional distress. At common law, the fear of unlimited liability focuses on the number of "bystanders" who could potentially assert claims for negligent infliction of emotional distress. Critics of the bystander theory question where the chain of causation would end. The hypothetical assassination of the President serves as a poignant example of the potential for unlimited liability: Would the assassin be held liable to the millions of distressed people around the world who may have witnessed the event on television?


181. See Phillips, supra note 21, at 49 (stating that FELA serves as real and valuable incentive to promote employee safety in railroad industry). In the past, the Third Circuit has recognized that the issue of general working conditions is within the exclusive province of labor-management contract negotiations. Holiday v. Consolidated Rail Corp., 914 F.2d 421, 424 (3d Cir. 1990), cert. denied, 498 U.S. 1090 (1991). As such, the union regularly monitors the working conditions structured by management. Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 384 (3d Cir. 1993) (Roth, J., dissenting) (stating that working rules and conditions of rail workers' jobs are structured by management and monitored by union), rev'd, 114 S. Ct. 2496 (1994). Because of management-union cooperation on the issue of working conditions, a compelling reason is necessary to justify the disruption of the delicate balance of the collective bargaining agreement. Id.

A recent study by the Consumer Federation of America concluded that a tort compensation system, such as the one established by FELA, provides a strong incentive to improve employee safety. See Phillips, supra note 21, at 54 (arguing that tort compensation system promotes employee safety). Consequently, recognition of a tort action for extended exposure to dangerously stressful working conditions would provide an incentive to railroads to identify and correct such working conditions. See id. (noting that railroads took no corrective action in hazardous clean-up cases until injured workers brought suits against employers under FELA).

182. See Carlisle, 990 F.2d at 98 (limiting work-related stress to genuine claims that are foreseeably caused by alleged working conditions).

183. See Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2418 (1994) (Ginsburg, J., dissenting) (noting that because FELA only covers railroad employees and not "public at large," the scope of potential plaintiffs is "hardly infinite."

184. Bell, supra note 48, at 363.

185. See id. (referring to argument made by critics regarding concept of full recovery for bystanders).

186. Id. at 365 n.129.
However, as Justice Ginsburg acknowledged in her *Gottshall II* dissent, bystander recovery is not the type of liability implicated by work-related stress claims brought under FELA. In the FELA context, liability is limited to the duty owed by an employer to an employee. Consequently, a breach of an employer's duty to provide a safe workplace extends only to the individual employees affected by the allegedly dangerous working conditions. The chain of causation begins and ends with the specific employees allegedly injured by the unsafe working conditions.

The real threat of excessive employer liability under FELA for work-related stress claims, however, arises from the potential number of railroad employees who have experienced some form of work-related stress. In view of this type of potential FELA liability, the *Carlisle* court wisely limited railroad liability under FELA by requiring plaintiffs to prove extended exposure to dangerous and stressful working conditions. This limitation protects railroad employers in two ways. First, the requirement of "extended exposure" prevents employees from seeking recovery for work-related stress related to isolated incidents. Second, the require-
ment of "dangerous and stressful" working conditions protects employers from potentially fraudulent claims for work-related stress by establishing a higher threshold of harm. As such, plaintiffs must prove the existence of "dangerous and stressful" working conditions, rather than merely alleging that their emotional injuries were the result of ordinary employment conditions. By placing restrictions upon plaintiffs seeking recovery for work-related stress, the Carlisle court appropriately recognized that railroad employers are not the insurers of employees' emotional well-being. Rather, an employer's duty under FELA is limited to protecting employees from unreasonably harmful working conditions.

B. Alternative Legal Grounds for Carlisle Holding

The Carlisle court based its holding that work-related stress is compensable under FELA upon the United States Supreme Court's decision in Urie. Despite properly summarizing the Urie holding, the Third Circuit failed to consider the limitations subsequently placed on Urie by the Buell court. Specifically, the Carlisle court held:

We disagree [that job-related stress is not recoverable under FELA]. The Supreme Court [in Urie] has held that "the wording [of the FELA] was not restrictive as to . . . the particular kind of injury resulting." Under this explication of the FELA, it is becoming more and more apparent that emotional and physical injuries that are the foreseeable result of requiring workers to remain in unreasonably dangerous and stressful work conditions for significant periods of time can present a claim under the statute.


194. See Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1019-20 (Me. 1979) (adopting "unusual stress" test for gradual stress claim brought under state workers compensation system); Fred J. Pompeani, Mental Stress and Ohio Workers Compensation: When is a Stress-Related Condition Compensable?, 40 CLEV. ST. L. REV. 35, 54 (1992) (noting that in adopting "unusual stress" test, court in Townsend established significantly higher threshold of proof for work-related stress claims that will serve as appropriate buffer between employer and host of malingering claims).

195. See Carlisle, 990 F.2d at 97 (requiring proof of "dangerous and stressful working conditions" as prerequisite to claim brought under FELA for negligent infliction of emotional distress); see also Pompeani, supra note 194, at 54 (discussing need for higher threshold of proof with regard to work-related stress claims).

196. See Carlisle, 990 F.2d at 98 (emphasizing that employee claims for work-related stress must be genuine and properly allege negligent conduct on part of employer); see, e.g., Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949) (stating that under FELA railroad employers are not insurers of employees' health); Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 379 (3d Cir. 1993) (recognizing that FELA does not require employers to be insurer of employees' safety), rev'd, 114 S. Ct. 2396 (1994).

197. See Gottshall, 988 F.2d at 375-76 (noting that creation of unreasonably dangerous work conditions by railroad constitutes breach of employer's duty owed to its employees under FELA).

198. Carlisle, 990 F.2d at 96 (citing Urie v. Thompson, 337 U.S. 163, 181 (1949)). Specifically, the Carlisle court held:

We disagree [that job-related stress is not recoverable under FELA]. The Supreme Court [in Urie] has held that "the wording [of the FELA] was not restrictive as to . . . the particular kind of injury resulting." Under this explication of the FELA, it is becoming more and more apparent that emotional and physical injuries that are the foreseeable result of requiring workers to remain in unreasonably dangerous and stressful work conditions for significant periods of time can present a claim under the statute.
Court with regard to the issue of emotional injuries. In essence, the Court in *Buell* refused to extend the *Urie* Court’s broad construction of the term “injury” in FELA to negligent infliction of emotional distress claims. In so holding, the *Buell* Court signalled that *Urie* was an inappropriate basis for establishing the cognizability of FELA claims for emotional distress.

While the *Carlisle* court correctly held that dangerous work-related stress is compensable under FELA, the court could have based its holding on other, more persuasive grounds. First, the court could have adopted the reasoning of the Supreme Court in *Kernan*, because the rationales underlying both *Kernan* and *Buell* are strikingly similar. Second, in following *Buell*’s guidance, the *Carlisle* court could have justified its holding as consistent with common law developments regarding negligent infliction of emotional distress.

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199. *Carlisle*, 990 F.2d at 96. The *Carlisle* court properly observed that the Supreme Court in *Urie* expansively defined the term “injury” as “all inclusive.” *Id.*

200. See *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 570 (1987). Contrary to the *Urie* Court’s holding that the term “injury” was “all-inclusive,” the *Buell* Court held that “broad pronouncements in this area may have to bow to the precise application of developing legal principles.” *Id.* In *Urie*, the Supreme Court clearly established broad pronouncements with regard to the term “injury” in FELA, concluding that “[t]he language [of FELA] is as broad as could be framed . . . [making] every injury suffered by any employee while employed by reason of the carrier’s negligence . . . compensable.” *Urie* v. Thompson, 337 U.S. 163, 181 (1949). As a result, the *Buell* Court implicitly modified *Urie*’s “all-inclusive” construction of the term “injury.” See *Buell*, 480 U.S. at 570 (concluding that whether emotional injuries are cognizable under FELA is not purely question of statutory construction). For a discussion of the *Buell* holding, see *supra* notes 60-65 and accompanying text.

201. See *Buell*, 480 U.S. at 570 (concluding that compensability of emotional injuries is not “susceptible to an all-inclusive ‘yes’ or ‘no’ answer”). The *Buell* Court stated that it was inappropriate to consider the issue of emotional injuries as “an abstract point of law or a pure question of statutory construction,” which was the approach followed in *Urie*. See *id.* (referring to general rationale of *Urie* holding).

202. See *Carlisle*, 990 F.2d at 97 (holding that when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury, employer may be held liable under FELA for employee’s resulting injuries). For a discussion of several more persuasive grounds upon which to base the *Carlisle* holding, see *infra* notes 205-35 and accompanying text.

203. See *Kernan v. American Dredging Co.*, 355 U.S. 426, 437 (1958) (noting that federal courts must “evolve” FELA jurisprudence in same manner as common law). For a discussion of how *Kernan* provides a basis for the Third Circuit’s holding in *Carlisle*, see *infra* notes 205-20 and accompanying text. For an additional discussion of the similarities between the *Kernan* and *Buell* holdings, see *infra* notes 209-10 and accompanying text.

204. See *Buell*, 480 U.S. at 568 (acknowledging that FELA jurisprudence “gleans guidance from common-law developments”). For a discussion of how the *Car-
1. Kernan as Precedent for the Carlisle Decision

The Supreme Court in Kernan interpreted FELA as establishing a “system of . . . compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.”205 According to the rationale of Kernan, the dangers faced by railroad workers would change as the industry matured.206 Consequently, as the risks of railroad employment change, so also should FELA’s remedies. The Kernan decision reflects an understanding that the risks in railroad employment could change over time, and therefore, provides a more persuasive basis for the Carlisle holding.

Unlike Urie, the Kernan decision was not limited by the Court’s holding in Buell.207 In fact, Kernan and Buell interpreted FELA in a similar manner. Specifically, the Kernan Court construed FELA as evolving “much in the manner of the common law,”208 while the Buell Court interpreted the scope of FELA in accordance with “developing legal principles.”209 Both of the Court’s holdings essentially acknowledge the need to interpret FELA as evolving in accordance with changes in the railroad industry.210

lisle holding is consistent with common law developments concerning negligent infliction of emotional distress, see infra notes 221-35 and accompanying text.

205. Kernan, 355 U.S. at 437. For a discussion of the Kernan’s factual background and holding, see supra note 55 and accompanying text.

206. See Kernan, 355 U.S. at 432 (observing that Congress in creating FELA intended no static remedy, but one which would develop and enlarge to meet changing conditions in railroad industry). Although the Court in Buell refused to rule on the issue of emotional injuries under FELA, the Kernan Court construed FELA to be a broad remedial statute that is responsive to changes in the railroad industry. Id. In view of the Kernan Court’s interpretation, it is clear that FELA was enacted to provide a remedy for dangerous working conditions, even if caused by job-related stress. See Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 368 (3d Cir. 1993) (recognizing that humanitarian policy concerns articulated in Kernan regarding FELA do not change with nature of injury), rev’d, 114 S. Ct. 2396 (1994). For a discussion of the view that Congress intended FELA to develop and expand to meet the work-related hazards currently facing railroad workers, see supra note 57 and accompanying text.

207. Compare Buell, 480 U.S. at 570 (“[B]road pronouncements in this area [FELA jurisprudence] may have to bow to the precise application of developing legal principles to the particular facts at hand.”) with Kernan, 355 U.S. at 437 (“[B]y using generalized language, it [Congress] created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles [for] providing compensation [under FELA] . . . .”) and Urie v. Thompson, 337 U.S. 163 (1949) (“The language [of FELA] is as broad as could be framed . . . .”).


209. See Buell, 480 U.S. at 568-70 (concluding that scope of FELA with regard to emotional injuries must be determined in light of common-law developments).

210. See id. at 570 (acknowledging need for continued development of legal principles in FELA jurisprudence); Kernan, 355 U.S. at 437 (recognizing that FELA jurisprudence must be developed to reflect “changing realities of employment in the railroad industry”).
The *Kernan* rationale is clearly relevant in view of the recent changes that have taken place in the railroad industry over the last twenty years.\(^{211}\) Facing heavy competition in the freight transportation business,\(^{212}\) many railroads have streamlined operations in order to be price competitive by significantly reducing their work forces and assigning greater responsibilities to the remaining employees.\(^{213}\) While the physical dangers associated

211. See Henry H. Perritt, Jr., *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis*, 28 Vill. L. Rev. 272, 298 (1983) (observing that financial problems were sapping viability of railroad system in northeastern United States and necessitated changes in structure of operations). During the decades of the 1960s and 1970s, all railroads in the northeast region were suffering financial problems. *Id.* at 298. One of the primary causes of the regional railroads’ financial problems was excessive labor costs. *Id.* at 285. Labor costs were rising out of control because railroads were forced by the labor unions to assure job security for all railroad workers. *Id.* at 286. Consequently, railroads were unable to reduce labor costs through workforce reductions. *See id.* (concluding that assuring job security imposed economic burden on railroads). Major change in the railroad industry did not come easy. *See Agis Salpukas, How Railroads Cut Jobs Without Drawing Blood*, N.Y. Times, Oct. 13, 1991, § 3, at 9 (citing Union Pacific as example of railroad that was slow to institute major changes).


212. *See Perritt, supra* note 211, at 280 (noting that competitive trucking industry was factor affecting profitability of railroads); Salpukas, *supra* note 211, at 9 (noting that truckers are in direct competition with railroads); James Schwartz, *What’s New in Freight Trains; A Struggle to Shrink the Work Force*, N.Y. Times, Aug. 13, 1989, § 3, at 13 (reporting that truckers have kept prices lower than railroads and have grabbed market share).

213. Salpukas, *supra* note 211, at 9. Since 1980, major freight railroads have cut their workforces in half. *Id.* For example, Union Pacific has cut its workforce by nearly 36% and has gone from 45,000 employees to 29,000 employees. *Id.* Other carriers took similar action during the decade. *See, e.g.*, *CN Rail May Slash 10,000 Jobs in Next 5 Years to Control Costs*, Journal of Commerce, Nov. 30, 1992, § B, at 4 (reporting that CN North America plans to reduce workforce by 30%); Reuters, *CSX Reports Loss: 25% of Staff to be Cut*, N.Y. Times, July 2, 1988, § 1, at 33 (noting that CSX Corporation laid off about 8,200 employees or 25% of payroll). Similarly, Norfolk Southern Corporation and Southern Pacific Transportation Company cut their workforce by nearly 30%. *See Southern Pacific Cuts*, N.Y. Times, Nov. 20, 1985, at D5 (reporting that in largest job cut in 123 years, Southern Pacific was slashing workforce by 10,000 employees); *Norfolk Will Trim 5,000 Jobs*, N.Y. Times, Oct. 28, 1987, at D5 (noting that Norfolk Southern was eliminating 5,000 jobs as part of cost-cutting restructuring). As a result of the workforce reductions,
with railroad employment have declined dramatically,\textsuperscript{214} the risks associated with unreasonably dangerous and stressful work conditions have increased.\textsuperscript{215} Therefore, under \textit{Kernan}, federal courts should expand the remedies provided by FELA to address the growing problem of stressful work conditions in the railroad industry.

Under the \textit{Kernan} rationale, the plaintiff in \textit{Carlisle} was a victim of Conrail's cost-cutting and streamlining efforts in three ways.\textsuperscript{216} First, the plaintiff was forced to assume far greater responsibility as a result of work force cuts at Conrail.\textsuperscript{217} Second, he was under constant pressure to keep the trains running on schedule, despite Conrail's aging railstock and outdated switching equipment.\textsuperscript{218} Third, the plaintiff was required to work long and erratic hours as a result of work force reductions.\textsuperscript{219} Because these factors contributed significantly to the plaintiff's stressful working conditions, the \textit{Carlisle} court could have easily used the \textit{Kernan} decision to support its holding that dangerous work-related stress is compensable under FELA.\textsuperscript{220}

\section*{2. Carlisle Consistent with Common Law Developments}

State common law further supports the holding in \textit{Carlisle}.\textsuperscript{221} In \textit{Buell}, the Supreme Court acknowledged that developments in the common law concerning emotional distress claims would have significant influence worker productivity has soared. Salpukas, \textit{supra} note 211, at 9. In other words, railroad employees are working a great deal harder than in past years.

\textsuperscript{214} Schwartz & Mahshigian, \textit{supra} note 19, at 2 (noting that only 40 railroad employees were killed on duty in 1984 as compared to 11,839 in 1907).


\textsuperscript{216} \textit{Carlisle}, 990 F.2d at 92. For a discussion of the factual background of \textit{Carlisle}, see \textit{supra} notes 121-35 and accompanying text.

\textsuperscript{217} \textit{Carlisle}, 990 F.2d at 92.

\textsuperscript{218} \textit{Id}.

\textsuperscript{219} \textit{Id}.

\textsuperscript{220} \textit{Id} at 92, 97.

\textsuperscript{221} \textit{Id} at 97-98 (upholding FELA claim for negligent infliction of emotional distress caused by work-related stress). The Supreme Court in \textit{Buell} has indicated that common law developments regarding negligent infliction of emotional distress should serve as a guidepost for determining whether emotional injuries are cognizable under FELA. Atchison, Topeka & Santa Fe Ry. v. \textit{Buell}, 480 U.S. 557, 568 (1987). For a discussion of how recent developments in state common law provide an alternative basis on which to support the \textit{Carlisle} holding, see \textit{infra} notes 222-35 and accompanying text.
on whether emotional injuries are compensable under FELA.\textsuperscript{222} Accordingly, the \textit{Carlisle} court performed a cursory review of state common law regarding the standards for recovery of damages for emotional injuries.\textsuperscript{223} Finding little consensus among the states,\textsuperscript{224} the court in \textit{Carlisle} was unable to glean guidance from such common law developments.\textsuperscript{225} The \textit{Carlisle} court, however, failed to recognize that a trend among the states has developed regarding standards for recovery for emotional injuries.\textsuperscript{226}

An examination of the relevant common law indicates that a growing number of states allow recovery for emotional injuries when: 1) there is some "physical manifestation" of the emotional injury\textsuperscript{227} or 2) there is evidence of "severe emotional distress."\textsuperscript{228} The \textit{Carlisle} court's conclusion

\begin{itemize}
\item \textsuperscript{222} See \textit{Buell}, 480 U.S. at 568, 570 (concluding that determination of whether emotional injuries are cognizable under FELA requires application of developing legal principles to facts of case); see also \textit{Puthe v. Exxon Shipping Co., 2 F.3d 480, 482-83 (2d Cir. 1993) (observing that \textit{Buell} found FELA jurisprudence to be guided by common law developments); \textit{Gottshall v. Consolidated Rail Corp., 988 F.2d 355, 373-74 (3d Cir. 1993) (noting that \textit{Buell} directed federal courts to seek guidance from common law in determining degree to which negligent infliction of emotional distress is compensable under FELA)}, rev'd, 114 S. Ct. 2396 (1994); \textit{Elliot v. Norfolk & W. Ry., 910 F.2d 1224, 1227-28 (4th Cir. 1990) (recognizing that \textit{Buell} analysis requires examination of common law prior to determining whether emotional injuries are cognizable under FELA).}

\item \textsuperscript{223} \textit{Carlisle, 990 F.2d at 94-95. For a discussion of the \textit{Carlisle} court's review of the common law, see supra notes 140-45 and accompanying text.}

\item \textsuperscript{224} \textit{Carlisle, 990 F.2d at 94.}

\item \textsuperscript{225} \textit{Id. at 94-95 (citing W.E. Shipley, Annotation, Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong, 64 A.L.R.2d 100, 103 (1959) and Marlowe, Comment, Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress, 33 VILL. L. REV. 781, 782-817 (1988)).}

\item \textsuperscript{226} See \textit{id. at 94 (finding wide divergence in views among states regarding approach to recovery for negligent infliction of emotional distress). A majority of states follow the Restatement (Second) of Torts § 436A which requires evidence of physical manifestations of emotional injuries to recover for negligent infliction of emotional distress. \textit{Muchow v. Lindblad, 435 N.W.2d 918, 921 (N.D. 1989) (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 54 (5th ed. 1984)). For a discussion of the majority trend among state courts, see supra note 143.}

\item \textsuperscript{227} \textit{For a list of states which permit recovery for negligent infliction of emotional distress upon a showing of "physical manifestations," see supra note 143.}

\item \textsuperscript{228} \textit{See Molien v. Kaiser Found. Hosp., 616 P.2d 813, 821 (Cal. 1980) (concluding that cause of action may be stated for negligent infliction of serious emotional distress); Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970) (requiring serious mental distress to establish cause of action for negligent infliction of emotional distress); \textit{Bass v. Nooney Co., 646 S.W.2d 765, 777-78 (Mo. 1983) (holding that emotional distress must be sufficiently severe so as to be medically significant); \textit{Johnson v. Supersave Mkt., Inc., 686 P.2d 209, 213 (Mont. 1984) (concluding that emotional distress is compensable \textit{inter alia} when tortious conduct causes significant impact upon plaintiff); \textit{Schultz v. Barberton Glass Co., 447 N.E.2d 109, 113 (Ohio 1983) (allowing cause of action for negligent infliction of emotional distress where proof of serious emotional injury); see also \textit{Muchow}, 435 N.W.2d at 923 (re-}
that work-related stress is compensable under FELA is justifiable under both the physical manifestation test and the severe emotional distress test. Under the physical manifestation test, the plaintiff’s emotional viewing jurisdictions which require serious or severe emotional distress in place of bodily harm).

Several states have rejected the physical manifestation requirement as a limitation on recovery for negligent infliction of emotional distress. See, e.g., Taylor v. Baptist Medical Ctr., Inc., 400 So. 2d 369, 374 (Ala. 1981) (dispensing with bodily harm requirement for negligent infliction of emotional distress); Molien, 616 P.2d at 820 (holding that the “unqualified requirement of physical injury is no longer justifiable” to recover damages for negligent infliction of emotional distress); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180, 1184 (Conn. 1978) (holding that recovery for unintentionally-caused emotional distress does not depend on proof of ensuing physical injury or risk of harm from physical impact); Rodrigues, 472 P.2d at 519 (stating that the standard of proof for mental distress claim is some guarantee of genuineness); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981) (establishing serious emotional distress as element required for recovery of bystander claim for emotional distress and dispensing with physical manifestation requirement); Culbert v. Sampson’s Supermarkets Inc., 444 A.2d 433, 438 (Me. 1982) (rejecting requirement of physical manifestation of emotional injury and establishing instead requirement of serious emotional distress); Bass, 646 S.W.2d at 772-73 (avoiding any physical injury requirement and permitting recovery for emotional injury when medically diagnosable and medically significant); Johnson, 686 P.2d at 213 (noting that recovery for mental distress is allowed absent showing of physical injury where tortious conduct has had significant impact on plaintiff); James v. Lieb, 375 N.W.2d 109, 116 (Neb. 1985) (concluding that physical manifestation of psychological injury may be highly persuasive but such proof not necessary in action for negligent infliction of emotional distress); Portee v. Jaffe, 417 A.2d 521, 527-28 (N.J. 1980) (acknowledging that bystander recovery for negligent infliction of emotional distress is permissible where inter alia plaintiff establishes severe emotional distress); Schultz, 447 N.E.2d at 113 (rejecting contemporaneous physical injury requirement for negligent infliction of emotional distress in favor of proof of serious emotional distress); Sinn v. Burd, 404 A.2d 672, 679 (Pa. 1979) (concluding that psychic injury can be proven in absence of physical manifestation of such injury). In fact, some commentators predict that the physical manifestation requirement is destined for extinction. John E. Flanagan, Comment, Negligent Infliction of Emotional Distress: A Proposal for a Recognized Tort Action, 67 Marq. L. Rev. 557 (1984); see McCarthy, supra note 64, at 27-29. (discussing trend toward recognition of emotional well-being as interest worthy of legal protection in and of itself). Moreover, virtually all of the states have rejected the strict requirement of physical impact as a prerequisite to recovery for negligent infliction of emotional distress. Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557, 570 n.20 (1987).

229. Carlisle, 990 F.2d at 97. For a discussion of the specific limitations on work-related stress claims as articulated by the Carlisle court in its holding, see supra note 177 and accompanying text.

230. See Marlowe, supra note 48, at 800-01, 824 (discussing cases in which mental distress was actionable either upon showing of “physical manifestation” or “degree of mental distress suffered”). For a discussion of the physical manifestation test and the severe emotional distress test, see supra notes 143, 228. In addition, see supra note 142, which indicates that the objectives of each test are significantly different. But see Sinn, 404 A.2d at 679 (observing that physical manifestation of emotional injuries is highly persuasive evidence of severe emotional injury); Culbert, 444 A.2d at 437 (noting that although objective symptoms are not necessary, they may constitute highly persuasive evidence of severe mental distress). However, in view of the fact that a majority of states favors one of these
injury must cause some physical injury. The plaintiff in *Carlisle* suffered, *inter alia*, depression, loss of weight and a nervous breakdown. These symptoms are sufficient evidence of "physical injury" to require compensation of the plaintiff's emotional injuries. Under the severe emotional distress test, a plaintiff must assert an emotional injury which is both medically diagnosable and medically significant. Symptoms of a nervous breakdown and depression have been found to be both medically diagnosable and significant. Therefore, the plaintiff in *Carlisle* would also meet the severe emotional distress test and recover for his emotional injuries.

V. CONCLUSION

The Third Circuit's holding in *Carlisle* strikes an equitable balance between a railroad employee's interest in safe working conditions and a railroad's fear of excessive and frivolous litigation arising from unrestrained emotional distress claims. With regard to working conditions, the *Carlisle* decision would have enabled victims of dangerously stressful work conditions to seek just compensation for genuine emotional injuries. Job-related stress is a reality in the modern work place. National studies confirm that work-related stress pervades all occupations and affects the psychological well-being of millions of American employ-

...
Until Carlisle, few circuit courts recognized that FELA imposes a duty to provide an emotionally safe workplace on railroads. Thus, as Justice Ginsburg observed in her Gottshall II dissent, the Carlisle court's decision would have served as a powerful incentive for railroads to protect employees from foreseeable and dangerous work-related stress.

The Carlisle decision also carefully limited recovery to "foreseeable" emotional injuries that are the result of "extended exposure to dangerous and stressful working conditions." As Justice Ginsburg alluded to in her dissent, this limitation on the scope of FELA would have also protected railroads from potentially excessive and frivolous litigation because the potential for an explosion of work-related stress claims is staggering.

239. Id. at 35 (citing United States Dep't of Health and Human Servs., Proposed National Strategy for the Prevention of Psychological Disorders, Pub. No. 89-137 (1988)).

240. For a discussion of the circuit courts that have either refused to allow recovery for emotional injuries under FELA or avoided the issue altogether, see supra notes 82-101 and accompanying text.

241. See Gottshall II, 114 S. Ct. at 2419 (Ginsburg, J., dissenting) (acknowledging that Carlisle holding would provide "severely harmed workers" remedy for injuries suffered). For a discussion of how the Carlisle holding will motivate railroads to protect employees from dangerous work-related stress, see supra notes 179-81 and accompanying text.


243. See Gottshall II, 114 S. Ct. at 2418 (Ginsburg, J., dissenting) (suggesting that requirement of "objective medical proof" would limit number of "insubstantial" FELA claims). For a discussion of how the Carlisle holding will protect railroads from excessive and frivolous litigation, see supra notes 179-81 and accompanying text.

244. See Pompeani, supra note 194, at 36 (observing that some commentators fear that predicted increase in stress-related claims will destroy some state workers compensation systems). A useful comparison can be made between the FELA tort compensation system and state workers compensation systems because both share similar goals: providing just compensation for work-related injuries. Schwartz & Mahshigian, supra note 19, at 2 (acknowledging that FELA and no-fault workers compensation schemes were created to provide compensation for employees injured at work). Although there are obvious differences, several meaningful similarities exist between FELA and state workers compensation systems. First, both FELA and state workers compensation statutes were developed to provide lost compensation to workers and their families during periods of work-related disabilities, and to encourage employers to provide safe working conditions for their employees. Schrimpf, supra note 193, at 589-90. Second, both FELA and most state workers compensation systems were developed before the advent of claims for mental distress. Id. Consequently, similar to federal courts in FELA cases, state courts have confronted the issue of whether the term "injury," within their relevant workers compensation statutes, encompasses emotional injuries. See, e.g., Gontar, supra note 193, at 319 (noting that Louisiana Supreme Court found mental injuries to be compensable under state workers compensation statute); Pompeani, supra note 194, at 48 (noting that Ohio courts have sought to determine whether term "injury" as contained in Ohio Workers Compensation Act encompasses stress-related emotional injuries); Kim Nickell, Note, Gradual Stress: Compensable Under Worker's Compensation Law?, 56 U. Mo. KAN. CITY L. REV. 567, 571-73 (1988) (observing that Missouri courts have interpreted statutory term "injury" in their respective workers
compensation acts to include certain emotional injuries). Finally, some authorities contend that as a result of the Supreme Court’s liberal interpretation of FELA with respect to the tort elements of negligence and causation, the FELA tort system has virtually evolved into a “no-fault” system, similar to workers compensation. Schwartz & Mahshigian, supra note 19, at 7. There are also several differences between FELA and state workers compensation systems. The first difference relates to the issue of employer negligence. Unlike FELA, workers compensation systems are not fault based. Schrimpf, supra note 193, at 598. But see Schwartz & Mahshigian, supra note 19, at 7 (arguing that Supreme Court’s liberal interpretation of FELA that requires minimal showing of employer negligence moves FELA much closer to “no-fault” system such as workers compensation). Consequently, workers are not required to prove that employer negligence caused their injuries. Schrimpf, supra note 193, at 598. The second difference between FELA and workers compensation systems involves the procedures required to bring an injury claim. Under the FELA tort system, railroad workers must initiate suit against their employers in federal court. See Schwartz & Mahshigian, supra note 19, at 7 (noting that employees seeking recovery under FELA must assert successful tort action for negligence). On the other hand, injured employees covered by workers compensation systems must bring their claims before an administrative agency. Taylor, supra note 20, at 27. The final difference between the two systems relates to the compensation that can be obtained for employee injuries. Under FELA, workers may recover damages for lost wages and pain and suffering. Schwartz & Mahshigian, supra note 19, at 8. Employees covered by workers compensation systems, however, are entitled only to lost wages and medical expenses associated with the time the employee was out of work. Id. at 14.

The current explosion of work-related stress claims in many state workers compensation systems illustrates the potential liability that railroad employers could face if unrestrained claims for work-related stress were permitted under FELA. See Taylor, supra note 20, at 27 (noting that damage awards paid by employers would arise from jury awards and settlement agreements). For example, some state workers compensation systems have begun to allow recovery for certain work-related stress disabilities. See, e.g., Wade v. Anchorage Sch. Dist., 741 P.2d 634, 638-40 (Alaska 1987) (allowing workers compensation claim for job-related stress); Sloss v. Indus. Comm’n, 588 P.2d 303, 304 (Ariz. 1978) (permitting recovery for work-related stress upon showing of “unexpected, the unusual, or extraordinary stress”); Royal State Nat’l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 487 P.2d 278, 282 (Haw. 1971) (sustaining workers compensation claim for mental collapse attributable to pressures of work); Albanese’s Case, 389 N.E.2d 83, 84 (Mass. 1979) (holding that an “employee [who] is incapacitated by mental or emotional disorder causally related to a series of specific stressful work-related incidents” is entitled to workers compensation); Caron v. Maine Sch. Admin. Dist. No. 27, 594 A.2d 560, 562 (Me. 1991) (allowing workers compensation claim for job-related stress upon showing of “extraordinary and unusual” pressure); Deziel v. Difclo Lab., Inc., 268 N.W.2d 1, 12 (Mich. 1978) (permitting recovery under state workers compensation statute for work-related stress when there is evidence of “personal injury”); Fought v. Stuart C. Irby, Co. 523 So. 2d 314, 317 (Miss. 1988) (allowing recovery for mental injury under workers compensation when injury caused by “something more than the ordinary incidents of employment”); New Hampshire Supply Co. v. Steinberg, 400 A.2d 1168, 1168 (N.H. 1979) (recognizing that heart attack caused by job-related mental stress could be compensable by workers compensation); Wolfe v. Sibley, Lindsay & Curr Co., 330 N.E.2d 603, 606 (N.Y. 1975) (holding that claim for nervous injury suffered in course of employment is recoverable under workers compensation); Martin v. Ketchum, Inc., 568 A.2d 159, 164 (Pa. 1990) (acknowledging that mental illness is compensable when caused by “abnormal working conditions”); Rega v. Kaiser Aluminum & Chem. Corp., 475 A.2d 213, 217 (R.I. 1984) (holding that employee who suffered nervous breakdown caused by work-related stress is entitled to benefits provided by workers compensation); Mc-
Under *Carlisle*, however, frivolous claims by employees that allege isolated incidents of work-related stress or working a significant amount of overtime would have been dismissed.\[245\] Furthermore, by requiring that the resulting emotional injuries be "reasonably foreseeable," the *Carlisle* decision would have protected railroads from excessive litigation for unexpected emotional injuries.\[246\]

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Whorter v. South Carolina Dep’t of Ins., 165 S.E.2d 365, 365 (S.C. 1969) (considering workers compensation claim that job-related stress caused fatal heart attack); Swiss Colony, Inc. v. Dep’t of Indus., Labor & Human Relations, 240 N.W.2d 128, 130 (Wis. 1976) (allowing recovery for "stresses and strains which were out of the ordinary"); Consolidated Freightways v. Drake, 678 P.2d 874, 877 (Wyo. 1984) (allowing claim for mental injury caused by conditions of employment that are of "greater magnitude than the day-to-day stresses and tensions all employees usually experience"); see also Pompeani, *supra* note 194, at 52 nn.85-90. Given the magnitude of claims already filed by workers, recent commentators fear that the projected increases in work-related stress claims will bankrupt some state systems. Pompeani, *supra* note 194, at 36; see Christy L. DeVader & Andrea Giampetro-Meyer, *Reducing Managerial Distress About Stress: An Analysis and Evaluation of Alternatives for Reducing Stress-Based Workers’ Compensation Claims*, 31 SANTA CLARA L. REV. 1, 5 (1990) (observing that work-related claims for workers compensation are placing heavy burden on state systems).

The lesson from the comparison of the FELA tort compensation system with other state workers compensation systems is simple: If unchecked, FELA could face the specter of unrestrained claims for work-related emotional injuries. See Pompeani, *supra* note 194 at 36-37 (noting that many state workers compensation systems are currently facing specter of unrestrained claims for work-related emotional injuries). Such an explosion of claims could threaten the financial stability of the railroad industry. For a discussion of the potential liability faced by employers if FELA were construed to permit unrestrained claims for work-related stress, see *supra* discussion. Therefore, limiting plaintiff’s claims to those involving "extended exposure" to “dangerous and stressful working conditions” protects employers from the destructive effects of unrestrained claims for work-related stress. For a discussion of how the requirements of "extended exposure" and "dangerous and stressful working conditions" serve to limit employer liability for work-related stress claims, see *supra* notes 191-97 and accompanying text.

\[245\] *See Carlisle*, 990 F.2d at 97 (requiring extended exposure to dangerous work-related stress); *see also Gottshall II*, 114 S. Ct. at 2418 (Ginsburg, J., dissenting) (proposing requirement of “objective medical proof” as means of limiting “insubstantial” FELA claims).

\[246\] *See Carlisle*, 990 F.2d at 97 (emphasizing that emotional injuries must be reasonably foreseeable result of work-related stress). For a discussion regarding the *Carlisle* court’s emphasis on providing railroads a reasonable opportunity to gain notice of the allegedly dangerous and stressful working conditions, see *supra* notes 192-97 and accompanying text.